

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1378

JRF

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1378

UNITED STATES OF AMERICA,

Appellee.

—against—

JOHN J. O'CONNOR

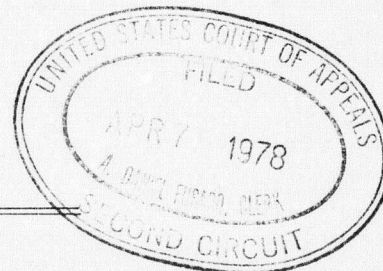
Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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*United States Attorney for the
Southern District of New York
Attorney for the Appellee*



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APPENDIX - TABLE OF CONTENTS

	<u>Page</u>
Docket Entries.....	A1
Indictment.....	A3
Government's Memorandum On the Admissibility of Proof of Similar Acts.....	A6
Defendant's Memorandum of Law Regarding The Exclusion of Proof of Similar Acts.....	A12
Oral Argument and Trial Court's Ruling Admitting The Government's Inculpatory Similar Act Testimony.....	A27
Arthur Vorcheimer	
Direct.....	A44
Cross.....	A66
Redirect.....	A86
Recross.....	A93
Redirect.....	A96
Defendant's Memorandum In Support Of Admission of Exculpatory FBI Evidence.....	A102
Government's Memorandum in Opposition To Proposed Testimony of FBI Agent To Be Called by Defendant.....	A106
Defendant's Exhibit "Q" (FBI "302" Reports)- Pennsylvania.....	A109
Defendant's Exhibit "R" (FBI "302" Reports)- Eastern District.....	A116
Richard C. Gentlecore	
Direct.....	A136
Cross.....	A159

APPENDIX - TABLE OF CONTENTS (Continued)

	<u>Page</u>
Defendant's Memorandum of Law in Support of Motion to Remove a Juror and For a Mistrial.....	A197
Government's Memorandum in Opposition to Motion for a Mistrial.....	A204
John J. O'Connor:	
Direct.....	A207a
Cross.....	A207i
Court's Charge on Intent.....	A208
Court's Charge on "Similar Acts".....	A214
Court's Charge on Legislative Intent.....	A218a
First Allen Charge.....	A219
Second Allen Charge.....	A227
Jury Verdict and Recommendation of Clemency.....	A234

O'CONNOR, JOHN J.

0208 1

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76 1030 01

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OFFENSES CHARGED
Federal meat inspector accepting money
from company engaged in interstate commerce

1-3

INDICTMENT X

11-9-76

11-18-76

11-18-76

5-17-77

5-26-77

5-26-77

7-21-77

SENTENCE

X In all Charges
On Order
(if needed)

Other

MAGISTRATE

Lawrence Iason
791-0042

Gerard M. Damiani
McCormack & Damiani
P.O. Box 656 Bardonia N.Y. 10954
Tel. 914 623 7711

DATE	DOCUMENT	PROCEEDINGS
11-9-76	Filed Indictment.....	Cooper, J.
11-13-76	Deft. (Atty. present) pleads not guilty. Deft. R.O.R. Referred to Pierce, J. as being related to 76-cr-1027.	Cannella, J.
11-23-76	Filed Notice of Appearance by Gerard M. Damini & McCormack & Damiani, P.O. Box 656 Bardonia N.Y. 10954, Tel. 914 623-7711.	
11-23-76	Reassigned to Judge Cooper.	
1-6-77	Filed Dfts. Notice of Motion, Demand for Discovery & Inspection & Demand for Bill of Particulars. Rec. 1-18-77.	
2-25-77	Filed Govts. Response to Dfts. motion for Discovery & Bill of Particulars.	
4-1-77	Filed Memorandum & Order. Dfts. pre-trial motions denied, except to the extent indicated.....	Cooper J. (mailed notice)
4-12-77	Filed Govts. Notice of Readiness for Trial on or after April 13, 1977.	
4-1-77	Filed government's sentencing recommendation (6-2-)	

DATE	FILED FOR PROBATION DEPARTMENT	PAGE TWO	V EXEMPTIBLE DELAY
5-16-77	Filed Govts. Requests for the Voir Dire.		
5-16-77	Filed Govts. Memorandum of Law on the Admissibility of Proof of similar acts.		
5-16-77	Filed Govts. request to charge.		
5-17-77	Jury Trial begun before Judge Cooper		
5-18-77	Trial Cont'd.		
5-19-77	" "		
5 5-20-77	" "		
5-23-77	" "		
5-24-77	" "		
5-25-77	" "		
5-26-77	" & Concluded Jury Verdict - Dft. guilty on cts. 1&2 & not guilty on count 3 - Jury Polled Pre Sent. report Ordered. Prob Notified. Sentence June 23, 1977 at 10 AM.....Cooper J. ROR.....		
7-21-77	Filed Judgment and Probation/Commitment, atty.(Gerard M. Damiani) present. Two(2) Years pursuant to Title 18 USC 3651 on condition that the deft. serve Six(6) Months in a jail type institution, execution of the remainder of sentence suspended. and the deft. is placed on probation for a period of Eighteen (18) Months, subject to the standing probation. Deft. application for bail pending appeal, granted. Deft. released on his own recognizance. Deft. advised of his rights. 7.....Cooper, J. Issued Commitment 7-22-77.		
7-27-77	Filed Notice of Appeal to USCA, 2nd Circuit.		
8-16-77	Filed certification and transmittal of original record to USCA.		
3-6-78	Filed transcript of record of proceeding's dated, May 17, 18, 19, 20, 23, 24, 1977 & July 21, 1977.		
3-6-78	Filed Notice of transmittal and certification of 1st supp. records to USCA.		
3-14-78	Filed transcript of record of proceedings dated, May 25, 26, 1977.		
3-14-78	Filed notice of certification and transmittal of 2nd suppl. record to USCA.		

THE FOLLOWING IS A TRUE COPY OF THE ORIGINAL
INDICTMENT IN THE ACTION, REDUCED TO 8½" x
11" SIZE PAPER FOR THE CONVENIENCE OF THE
APPELLATE COURT.

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11-141

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

UNITED STATES OF AMERICA	:	<u>INDICTMENT</u>
- v -	:	76 Cr.
JOHN J. O'CONNOR,	:	
Defendant.	:	

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INTRODUCTION

The Grand Jury charges:

1. The Federal Meat Inspection Act, enacted on December 15, 1967 as Title I of the Wholesome Meat Act, requires the Secretary of Agriculture to provide for the inspection of establishments where meat and meat food products are processed.
2. At all times relevant to this Indictment, the defendant, JOHN J. O'CONNOR was an inspector, officer and employee of the United States Department of Agriculture, Meat and Poultry Inspection Program, authorized to perform the duties required by the Federal Meat Inspection Act of 1967.
3. At all times relevant to this Indictment, the West Harlem Pork Center, Ltd., located at 2350 Twelfth Avenue, New York, New York, was engaged in interstate commerce and was inspected by inspectors, officers and employee of the United

States Department of Agriculture, Meat and Poultry Inspection Program pursuant to the Federal Meat Inspection Act of 1967.

4. At all times relevant to this Indictment, Kupferberg Brothers, located at 2305 Twelfth Avenue, New York, New York, was engaged in interstate commerce and was inspected by inspectors, officers and employees of the United States Department of Agriculture, Meat and Poultry Inspection Program pursuant to the Federal Meat Inspection Act of 1967.

5. At all times relevant to this Indictment, F. Strassberger, Inc., located at 2328 Twelfth Avenue, New York, New York, was engaged in interstate commerce and was inspected by inspectors, officers and employees of the United States Department of Agriculture, Meat and Poultry Inspection Program pursuant to the Federal Meat Inspection Act of 1967.

COUNT ONE

The Grand Jury further charges:

From on or about the 8th day of July 1974, up to and including the 4th day of January 1975, in the Southern District of New York, the defendant JOHN J. O'CONNOR unlawfully, wilfully and knowingly did receive and accept from the West Harlem Pork Center, Ltd. money and other things of value, that is, approximately \$25 weekly.

(Title 21, United States Code, Section 622.)

COUNT TWO

The Grand Jury further charges:

From on or about the 21st day of July 1974, up to and including the 4th day of January 1975, in the Southern District of New York, the defendant JOHN J. O'CONNOR unlawfully, wilfully

and knowingly did receive and accept from Kupferberg Brothers money and other things of value, that is, approximately \$15 weekly.

(Title 21, United States Code, Section 622.)

COUNT THREE

The Grand Jury further charges:

From or or about the 7th day of July 1974, up to and including the 4th day of January 1975, in the Southern District of New York, the defendant JOHN J. O'CONNOR unlawfully, wilfully and knowingly did receive and accept from F. Strassburger, Inc. money and other things of value, that is, approximately \$50 weekly.

(Title 21, United States Code, Section 622.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

UNITED STATES OF AMERICA,	:	
- v -	:	76 Cr. 1030 (IBC)
JOHN O'CONNOR,	:	
Defendant.	:	

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GOVERNMENT'S MEMORANDUM OF LAW ON
THE ADMISSIBILITY OF PROOF OF SIMILAR
ACTS

The Government submits this memorandum in support of its position that evidence of certain acts not charged in the Indictment but similar to the acts charged should be admitted in evidence during this trial.

The defendant is charged with having taken money from three separate companies he was inspecting while he was a federal meat inspector. According to the Indictment O'Connor took this money on a weekly basis. The Government's proof at trial will consist essentially of the testimony of one or two individuals at each of the three companies who will testify that they paid O'Connor money each week while he was an inspector assigned to their companies. In addition the Government will call an official of the United States Department of Agriculture who will introduce time and attendance records that will

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establish on which dates O'Connor worked at each of these companies.

In view of the fact that approximately three witnesses will testify that they paid money to O'Connor under circumstances that would make the receipt of that money a crime, it would appear that O'Connor has three possible lines of defense, each of which would make similar act testimony admissible. The first line of defense is that O'Connor might claim that the witnesses are mistaken in identifying him as an inspector who took money. Secondly, O'Connor might claim that the Government witnesses are lying because they have reached an agreement with the Government. Thirdly, O'Connor might claim that the money was taken without unlawful intent and not in connection with his official duties but as a gift.

The Government wishes to offer proof that O'Connor accepted money from other companies he was inspecting in order to show a pattern of conduct on O'Connor's part. This pattern will help the Government meet its burden of proof beyond a reasonable doubt that the witnesses are not mistaken or lying and that the money was taken not as a gift but in connection with O'Connor's duties as a meat inspector. The similar act proof will be essentially the same as the proof the Government will offer on the counts charged in the Indictment. This

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proof also will consist of testimony from one or two witnesses of two or three companies whose anticipated testimony will be that they paid money to O'Connor on a weekly basis when he was inspecting their plants.

This evidence is admissible under Rule 404(b) of the Federal Rules of Evidence which provides that:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The evidence the Government wishes to offer will prove intent, plan, knowledge and the absence of any mistake or accident. We wish to point out that in addition to the highly probative nature of this evidence, it has none of the prejudicial impact often associated with proof of crimes not charged in the indictment. That prejudicial impact is illustrated by the offer of proof that the defendant, charged with selling narcotics, possessed a gun, or that the defendant, charged with bank robbery, robbed a supermarket. The prejudicial effect from proof that a defendant possessed a gun or robbed a supermarket is absent from the proof the Government wishes to offer against O'Connor.

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It is settled in this Circuit that evidence of other crimes is admissible if introduced for any purpose other than to show the defendant has a bad character or is a bad person. E.g., United States v. Santiago, 528 F.2d 1130, 1134-1135 (2d Cir. 1976); United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975); United States v. Gerry, 515 F.2d 130 (2d Cir. 1975), cert. denied, 44 U.S.L.W. 3358 (December 15, 1975); United States v. Eliano, 522 F.2d 201 (2d Cir. 1975); United States v. Papadakis, 510 F.2d 237 (2d Cir.), cert. denied, 421 U.S. 950 (1975); United States v. McCarthy, 473 F.2d 300 (2d Cir. 1972); United States v. Fried, 464 F.2d 983 (2d Cir.), cert. denied, 407 U.S. 911 (1972); United States v. Deaton, 331 F.2d 114 (2d Cir. 1967); Rule 404(b), Federal Rules of Evidence. In ruling on the admissibility of this evidence, the District Court must weigh the probative value of the evidence against its potentially prejudicial effect. This question is addressed to the sound discretion of the trial court, whose determination is entitled to great weight. United States v. Leonard, 524 F.2d 1076, 1080 (2d Cir. 1975); United States v. Brettholz, 435 F.2d 483, 487-488 (2d Cir. 1973), cert. denied, 415 U.S. 976 (1974). Proof of other similar acts is admissible to

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show that the crimes charged in the Indictment were part of a larger continuing plan or design. United States v. Birrell, 447 F.2d 1168, 1172 (2d Cir. 1971). O'Connor will be able to argue the defenses the Government has referred to in the third paragraph of this memorandum, and the Government would not have this similar act evidence in the record.

It is well settled that evidence of a similar act is admissible in the Government's direct case where knowledge or intent is at issue, "either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense."

United States v. DeCicco, 435 F.2d 478, 483 (2d Cir. 1970).

Here, as in United States v. Zochowski, 331 F. Supp. 1070, 1072, n. 5 (S.D.N.Y. 1971) (Weinfeld, J.), aff'd, 456 F.2d 1336 (2d Cir. 1972):

"The defendant's objection that the evidence should not have been received in the government's direct case is without substance. The issue of knowledge was the hard core of the case, as was acknowledged in defense counsel's opening; moreover, knowledge is at issue as an essential element of the government's case." [citations omitted]

Finally, we wish to point out that the evidence we offer comes from approximately four witnesses. Their combined direct testimony should take no more than forty minutes or an hour and actually will probably consume a

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total of about twenty minutes. The defense was advised of the evidence of the three similar acts at least two weeks prior to trial. In view of the fact that these acts are so closely related to the acts charged in the Indictment, their proof should require little or no additional preparation. The Government already has provided the defense with complete open file discovery and has permitted counsel for the defendant to review all statements of the Government witnesses producible under 18 U.S.C. § 3500.

We respectfully submit that this evidence should be admitted.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

RICHARD F. LAWLER
Assistant United States Attorney

- Of Counsel -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

- v -

JOHN O'CONNOR,

Defendant.
-----X

DEFENDANT'S MEMORANDUM OF
LAW REGARDING THE EXCLUSION
OF PROOF OF SIMILAR ACTS

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TABLE OF CONTENTS

POINT I	Page
THE ALLEGED SIMILAR ACT TESTIMONY PROFERRED BY THE PROSECUTION SHOULD NOT BE ADMITTED SINCE IT IS NOT PROBATIVE OF A CONSEQUENTIAL FACT IN ISSUE, AND BECAUSE IT IS UNFAIRLY PREJUDICIAL TO DEFENDANT.	1 - 10
POINT II	
INTRODUCTION OF SIMILAR ACT TESTIMONY WOULD BE UNFAIRLY PREJUDICIAL, CONFUSE THE ISSUES, MISLEAD THE JURY, CAUSE UNDUE DELAY, WASTE THE COURT'S TIME, AND INDUCE NEEDLESS PRESENTATION OF CUMULATIVE EVIDENCE.	11- 13

POINT I

THE ALLEGED SIMILAR ACT TESTIMONY PROFERRED
BY THE PROSECUTION SHOULD NOT BE ADMITTED
SINCE IT IS NOT PROBATIVE OF A CONSEQUENTIAL
FACT IN ISSUE, AND BECAUSE IT IS UNFAIRLY
PREJUDICIAL TO DEFENDANT.

Rule 404(b) of the Federal Rules of Evidence provides:

"Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (emphasis supplied)

This rule does not make any appreciable change in the law followed before adoption of the Federal Rules of Evidence in 1975. See 2 J. Weinstein & M. Berger, Weinstein's Evidence, §404 (08) (1976). Evidence of an alleged prior crime or act may be admissible to prove such elements as those listed in the second sentence of Rule 404(b). The admissibility of the alleged prior act testimony is a matter for the trial judge to decide, in his sound discretion. The exercise of this discretion involves a "...balancing of the probative value of the proffered evidence...against its prejudicial character...." United States v. Byrd, 352 F. 2d 570, 574 (2d Cir. 1965). In striking this balance, the trial judge's determination is given great weight since "...he has a feel for the effect of the introduction of this type of evidence

that an Appellate Court...simply cannot obtain." United States v. Leonard, 524 F. 2d 1076, 1092 (2d Cir. 1975). The guidelines informing this sound discretion have been most succinctly expressed in United States v. Adderly, 529 F. 2d 1178, 1180 (5th Cir. 1976), in which the Court held:

"[T]he prior offense must be [1] similar and must [2] be convincingly proved, [3] it must not be too remote in time, [4] the exception to the general rule of exclusion for which the offense is admitted must be a material issue in the instant case, and [5] there must be a substantial need for the evidence. [6] The probative value of such prior misconduct must also be balanced against its prejudicial effect."

For Second Circuit cases regarding each of the above prerequisites see the following: United States v. Santiago, 528 F. 2d 1130 (2d Cir. 1976); United States v. Kaufman, 453 F. 2d 306 (2d Cir. 1971); United States v. Deaton, 381 F. 2d 114 (2d Cir. 1976); United States v. Byrd, supra: United States v. Marchiso, 344 F. 2d 653 (2d Cir. 1965).

Weinstein's Evidence suggests that a trial judge follow a step-by-step approach in evaluating whether the alleged similar act testimony should be admitted. First,

"In order for evidence of a prior criminal act to be admissible, the attorney must be prepared to explain precisely how this evidence may tend to prove or disprove a proper consequential fact in the case." Weinstein's Evidence, supra at p. 404-42.

Secc 1, "[O]nce the consequential material fact is

identified, the probative force of the other crime evidence must be assessed." Weinstein's Evidence, supra at p. 404-46. As noted in Adderly, supra, the judge's assessment of the probative force of alleged similar act testimony must include the similarity of the alleged similar act to the instant alleged offense, the nearness in time of the two alleged acts, how convincingly the prior act has been shown, and the similar act's materiality and the need for it in the present case.

The third step is the assessment of the prejudice to the defendant by the admission of the alleged prior act testimony, balanced against the probative value of the testimony.

Weinstein's Evidence, supra at p. 404-73&74, comments as follows on this difficult balancing:

"In the final analysis, admissibility will depend on the individual judge's evaluation of the justification for the rule as an appropriate device to protect accused persons. Adoption of Rule 104 suggests that the policy should be embraced in good faith by prosecutors and judges: the onus of showing prejudice overbalanced by need and good faith should rest on the prosecutor....[T]he parties must be prepared to convince the trial judge at the time the evidence is offered. Since both sides will probably be aware of the possibility that the issue will arise, it should be adequately briefed before the judge must rule. More important than lists of cases in such a brief is the detailed analysis of the facts to show why the proof of other crimes is needed, why its use may be prejudicial and how some compromise or limitation may protect both parties."

In its Memorandum of Law, the prosecution asserts blithely

at p.3 that it wishes to offer the contested testimony to prove intent, plan, knowledge at absence of any mistake or accident. It should be noted in a preliminary way that the absence of mistake or accident which similar act testimony may be admitted to prove is lack of mistake or accident of the defendant. It may not be admitted to bolster the prosecution's witness, as claimed in p. 2 of the prosecution's Memorandum.

Mr. O'Connor does not intend to "sharpen" the intent or knowledge elements of the alleged offenses. He does not intend to claim that he received the bribes, but without the requisite intent or knowledge. Nor does he contend that he received money from anyone in the meat industry by accident or mistake. His claim is simply that he did not receive the money or goods as charged in the indictment. In United States v. Philip Fierson, 419, F. 2d 1020, 1023 (7th Cir. 1968), the Court said:

"However, to justify admission into evidence of an accused's prior criminal acts to establish willfulness and intent, it is necessary that willfulness and intent be more than merely formal issues in the sense that the defendant is entitled to an instruction thereon. [Case cited] When, as in this case, the government has ample evidence to take the case to the trier of fact for its deliberation, a plea of not guilty cannot, by itself, be construed as raising such a keen dispute on the issue of willfulness and intent so as to justify admission of this type of evidence."

This is not a situation like that in United States v. Deaton, 381 F. 2d 114, 116 (2d Cir. 1967), in which intent was made the "primary issue" by defense counsel in his opening. This is more nearly a situation like that encountered in United States v. DeCicco, 435 F. 2d 478 (2d Cir. 1970). There, the defendants were convicted of conspiring to transport stolen goods in interstate commerce, knowing them to be stolen. Although specific intent, and not merely general intent, as here, was an element of the crime charged, the defense consisted merely of the assertion that the defendant did not perform the act, and not that they had performed the act but without the required intent, or without the proper knowledge, or by mistake or accident. The Court said at 483:

"[W]e conclude that the prejudice engendered by the admission into evidence of the prior acts of misconduct...far outweighed its legitimate probative worth, and that therefore it was an abuse of discretion for the trial court to allow its admission though the admission of the testimony was accompanied by cautionary instructions to the jury."

The Court pointed out that the defense consisted entirely of the attempt to impeach the Government's principle witness. The Court said at 484:

"This is not a case where, if one accepts [the Government witness'] testimony at face value, the statements and acts of the defendants lead to equivocal inferences. [His] story, if believed, leads ineluctably to the conclusion that the defendants knew what they were doing, for had any of the defendants admitted the facts

testified to by [him] any claim that they were ignorant of the nature of the goods or their intended destination for sale to a prospective buyer would be patently incredible. Therefore, whatever probative value the prior crimes... added to the prosecution's case on the issue of defendants' intent to commit the conspiracy here claimed was far outweighed by the unwarranted inference the jury was permitted to draw that the defendants...were a continuing band of art treasure thieves and 'fencers,'"

As Lord Sumner, quoted by Chief Judge Lumbard in his concurring opinion in DeCicco, supra at 486, said:

"The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice."

Here, the prosecution cannot get around Weinstein's first and second steps. They have not, and cannot, show that the disputed similar act testimony "may tend to prove or disprove a proper consequential fact in the case," in reference to intent, knowledge, accident, plan or mistake, since defendant has not and will not "sharpen" these issues. In short, the probative value of the evidence is, to say the least, questionable. General intent is, of course, part of the Government's case, and must be proved beyond a reasonable doubt. That intent can be inferred from proven acts, if the jury is inclined to credit the government witnesses. If similar act testimony were admissible to show general intent where the element is not part of defendant's active defense, as the Government must be contending here, then it would

be routinely admissible in all but "strict liability" prosecutions. As noted in United States v. Birns, 395 F. 2d, 943, 946 (6th Cir. 1968),

"[T]here was no defense asserted here that appellant did not intend to misrepresent his assets and unless the question of intent is in dispute, evidence concerning the commission of similar acts at other times should not ordinarily be admitted. United States v. Byrd, 352 F. 2d 570 (2d Cir. 1965)."

In Byrd, supra at 575, the Second Circuit said:

"The defense had not, either in its claims or the statement of facts which it would seek to prove, 'sharpened' the issue of intent by asserting that the act charged was done innocently or by accident or mistake.... There was, therefore, no pressing necessity that evidence of that prior occasion be offered on the Government's main case. United States v. Ross, 321 F. 2d 61, 67 (2d Cir. 1963).... For the present purpose of this discussion it is enough to point out that the scope of discretion does not include every offer of a prior similar offense which may contribute something to a showing of intent in the Government's main case. Where the prejudice is substantial and the probative value, through the nature of the evidence or lack of any real necessity for it, is slight, its admission at that stage may be held to be an abuse of discretion."

In reference to the claim that the similar act testimony is admissible to show plan or design, the prosecution also runs afoul of the first and second analytical steps. The presence or absence of a plan or scheme is not a consequential fact provable in this case. The indictment does not charge a

continuing conspiracy, or any conspiracy, for that matter. Even if common plan or scheme were a proper consequential fact provable in this case, the alleged similar acts lack substantial probative value, in part because of the two-year interval between the alleged acts.

Weinstein's Evidence subdivides similar act testimony sought to be admitted to prove plan or design into three categories:

(1) Same or common or connected or inseparable plan or scheme or transaction, or res gestae. This subcategory of plan or design is probative when it is introduced "" to complete the story of the crime on trial by proving its immediate context of happenings near in time and place."" Weinstein's Evidence, supra at p. 404-57.

(2) Continuing place, scheme or conspiracy. Evidence is probative of this subcategory when it is offered"" to prove the existence of a definite project directed toward completion of the crime in question."" (emphasis supplied). Weinstein's Evidence, supra at p. 404-59.

(3) Unique plan or scheme or pattern. Evidence is probative toward this subcategory when the "device used [is] so unusual and distinctive as to be like a signature." Weinstein's Evidence, supra at p. 404-61.

Here, none of these categories applies. Common plan or

scheme is not an element of the instant crime. No conspiracy is charged. Practically, the evidence of alleged similar act has only one purpose in the Government's case - to show that Mr. O'Connor is a "bad man" and should be convicted. That evidence is inadmissible for this purpose.

In United States v. Goodwin, 492 F. 2d 1141, 1152-1153 (5th Cir. 1974), the Court said the following about similar act testimony introduced to show plan:

"[C]ourts have permitted the introduction of [other-crimes] evidence to show a design or scheme on the part of the accused to commit the specific crime with which he is charged, but never to show a design or scheme to commit 'crimes of the sort with which he is charged.'"

In addition to the objection that the proffered similar act testimony is lacking in probative value of a consequential fact, the defendant asserts that, in any event, any such miniscule probative value it might have is far outweighed by its unfair prejudicial impact on defendant. As the Second Circuit said in Byrd, supra at 574:

"It is generally recognized that there can be no complete assurance that the jury, even under the best of instructions will strictly confine the use of this kind of evidence to the issue of knowledge and intent and wholly put out of their minds the implication that the accused, having committed the prior similar criminal act, probably committed the one with which he is actually charged."

The disputed testimony is particularly prejudicial here where the main issue is anticipated to be credibility and the similar act testimony consists of a series of witnesses all of whom must be impeached by defendant. Instead of impeaching a few government witnesses, defendant must attempt to impeach over half-a-dozen witnesses. Even if the Court were to find that the alleged similar act testimony were probative of a proper consequential fact in this case, that value is far overbalanced by the certainty of unfair prejudice to Mr. O'Connor.

POINT II

INTRODUCTION OF SIMILAR ACT TESTIMONY WOULD BE UNFAIRLY PREJUDICIAL, CONFUSE THE ISSUES, MISLEAD THE JURY, CAUSE UNDUE DELAY, WASTE THE COURT'S TIME, AND INDUCE NEEDLESS PRESENTATION OF CUMULATIVE EVIDENCE.

Rule 403 of the Federal Rules of Evidence provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

The balancing of probative value against the danger of unfair prejudice has been discussed in Point I, *supra*.

Both confusion of the issues and misleading the jury have traditionally been treated as one and balanced together against probative value. Weinstein's Evidence, *supra* at p. 403-24, notes that McCormick lumps these two categories together when he states that evidence can be excluded when there is "the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues." Courts generally look with disfavor on otherwise persuasive evidence if it would tend to provoke detailed rebuttal evidence or intricate judicial instructions in order to demonstrate how little probative value the evidence really has. United States v. Costello, 221 F. 2d 668 (2d Cir. 1955)

aff'd, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956). Appellate Courts generally approve the exclusion of evidence of questionable probative value which directly or indirectly prolongs trials and diverts the minds of the jurors to extraneous issues.

In United States v. Bowe, 360 F. 2d 1, 15-16 (2d Cir.) cert. denied, 385 U.S. 96, 87 S. Ct. 401, 17 L. Ed, 2d 306 (1966), the Court, in upholding the trial judge's exclusion of evidence, said:

"A trial judge has discretion to exclude evidence which is only slightly probative if its introduction would confuse and mislead the jury by focusing its attention on collateral issues and if it would unnecessarily delay the trial.... [I]t is apparent, as the trial judge stated after hearing extensive argument, that the introduction of the proffered testimony would have opened up a trial within a trial. It would not only have been proper to call witnesses to the alleged conversation...for purposes of clarifying whether, by whom and in what context the statements were made, but other witnesses might have been called for impeachment purposes. The trial judge correctly concluded that the confusion and delay which would have resulted from the introduction of Teahan's testimony outweighed its slight probative value."

See also United States v. DeMarco, 407 F. Supp. 107 (C.D. Calif. 1975), where testimony of questionable probative value was excluded because it would have involved the calling of three witnesses for impeachment and would have distracted the

jury from the truly relevant evidence.

In this case, it is anticipated by the defendant that if similar act testimony were admitted on behalf of the prosecution, it would be necessary to attempt to impeach that testimony at some length, as well as to introduce evidence from up to a dozen witnesses concerning these prior similar acts and other acts. It would be unfair to the defendant to allow the prosecution to reach back beyond acts which are central to this case, and foreclose that approach to the defendant. Defendant would be forced to reply in kind to the prosecution's tactics. This testimony and attempted impeachment from both sides would mire the trial in a morass of extraneous trivia. The line should be drawn now against all of this collateral testimony.

MP

267

(Recess.)

THE COURT: There has been an off-the-record discussion, and I have had the benefit of counsel's reactions.

The issue, which we have decided should be taken up in open court, relates to the receipt into evidence of prior similar acts.

I am going to ask counsel on both sides to bear with me and take it for granted that the Court understands their respective positions with regard to the law in this case. Their memos cover their positions, and they have been helpful. We have digested them. We think we know what the law has to say on the subject. We think we understand that.

What we want to concentrate now on is a factual recital. Please stick to that. I want to know what the facts will reveal, because that is the material on which will predicate the application of the law dealing with similar acts.

So will the Government be good enough to make a detailed recital of what you hope to develop?

MR. LAWLER: Yes, your Honor.

The Government would hope to show proof of similar acts, in other words, would hope to introduce testimony from witnesses from three companies, individuals who will state that they paid Mr. O'Connoor money or products while he

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2 was an inspector in their plant. The companies involved,
3 your Honor, would be George Korn & Son; there would be a
4 witness who stated that he did pay Mr. O'Connor a certain
5 amount of money each week during the period of time in which
6 he was assigned to the plant, during the tour in which he was
7 assigned to the plant.

8 There was a representative or one of the owners
9 of J. & N. Vorchelmer, who would also testify that when Mr.
10 O'Connor was assigned as an inspector at his plant, he
11 personally paid Mr. O'Connor money. There is also a manager
12 from Omaha Hotel Supply Company, who is prepared to testify
13 that he also gave Mr. O'Connor products when Mr. O'Connor
14 was an inspector at his plant.

15 The dates in question, your Honor, are during the
16 years 1974 and 1973, so that there would be different time
17 periods when Mr. O'Connor was assigned to these plants, but
18 they were in the years 1974 and 1973, and, in fact, on one
19 occasion with J. & N. Vorchelmer, he was there at different
20 times from '72 to 1974.

21 The testimony would consist approximately, at the
22 most, of five witnesses, your Honor, but more likely four
23 witnesses, and the Government has not decided at this time
24 whether it would introduce all of the similar acts evidence
25 that it has.

MP

269

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2 THE COURT: You are going to make up your mind
3 right now, sir. I don't want to leave anything hanging.

4 MR. LAWLER: No, your Honor. I would not introduce
5 it at all if I did not introduce it at this time. In other
6 words, I have three companies relating to similar acts.

7 THE COURT: What do you mean that you have not de-
8 cided on something?

9 MR. LAWLER: I will not make the decision to have
10 Mr. Bernstein testify from Omaha Hotel Supply, and if the
11 defendant takes the stand, depending upon what he would say
12 on cross-examination, I might use him in rebuttal.

13 THE COURT: In other words, what you are saying
14 is that if these witnesses were called to the stand, they
15 would testify to acts almost identical with the testimony
16 already elicited that was addressed to the indictment,
17 (1) the times set forth in the indictment, the acts set out in
18 the indictment, and you are saying that there is no differ-
19 ence in the type of testimony to be elicited other than the
20 dates, and it deals with dates prior to the dates set forth
21 in the instant indictment? Is that not the size of it?

22 MR. LAWLER: That is the size of it, your Honor.

23 THE COURT: Mr. Damiani, I would be glad to hear
24 from you.

25 MR. DANIANI: Your Honor --

MP

270

THE COURT: Just a little louder. The acoustics are not good. It is not because I am getting old, because I hear, but don't burden me.

(Discussion off the record.)

THE COURT: Now, on the record:

Raise your voice, because you are a good lawyer, and I want to hear what you have to say.

MR. DAMIANI: Your Honor, I will vehemently object to any presentation of similar acts testimony in this case on the basis of the offer of proof of the U. S. Attorney, in that the U. S. Attorney has not shown to the Court how this evidence may prove or disprove any evidence in the case.

I contend that before this evidence may be brought before this Court, it must be convincingly proved, and I respectfully submit that from the information that I have before me and that was relayed to me by the United States Attorney's office, that there is an absolute dearth of proof with regard to this convincing testimony. We are going to be faced with the testimony of Mr. Myron Bernstein of Omaha Supply, who has already testified before a grand jury in the Eastern District and who has indicated in that conversation before the grand jury and the U. S. Attorney in that court with regard to this investigation in the past

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271

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2 Industry during this same period of time, that this defendant
3 did not accept any money; he was not named. He was asked
4 by the U. S. Attorney before the grand jury for the names
5 of meat inspectors during that time. Only after the defendant
6 has entered the plea and is going to court, the agent, Arent
7 Gentilcore, in this proceeding begins to check on all of
8 the establishments Mr. O'Connor worked in, and he comes up
9 with Mr. Bernstein, and on March 8, 1976, he shows Mr.
10 Bernstein a series of photographs, all of individuals who
11 have been indicted in the Southern District, and he says,
12 "Do you identify any of these people?" He said, "I identify
13 John O'Connor. He never asked for a dime, and I never gave
14 him a dime."

15 As for the others, C. M. Darrow, three days later,
16 Mr. Gentilcore goes to see Mr. Darrow with the same photo-
17 graphs. Dr. Darrow pulls out O'Connor and says, "Who is
18 this guy? We never paid him anything. Isn't this the guy
19 we were afraid of?" And Myron Bernstein says, "No, this
20 isn't the guy we were afraid of. The guy we were afraid of
21 is X. This is John O'Connor." Mr. Darrow says, "Oh,
22 that's John O'Connor."

23 Now, three days later, Mr. Gentilcore says Mr.
24 Bernstein said, "We made up packages of meat for him."

25 We are going to be mired down for days.

(Mr. Vorchheimer appears before the grand jury in

MP

272

the Eastern District and never identifies Mr. O'Connor, and after engaging in this trial, we have Mr. Gentilcore interview people from the industry, and they all say, "We gave him X amount."

In connection with Mr. Korn, with Mr. Salvatore Cucurullo, he appears in the Eastern District. He is examined by the U. S. Attorney in that district, and he doesn't mention Mr. O'Connor. That individual had the photographs also.

Mr. Stephen Korn, I believe, or Mr. George Korn -- one of the Korns -- is examined by the U. S. Attorney, and he also doesn't acknowledge that Mr. O'Connor accepted any money. They go before the Federal grand jury in the Eastern District, and they swear that certain members took money, but neither one of them acknowledged that Mr. O'Connor took money, again for the same period of time that we can establish that Mr. O'Connor was working for them during the course of the grand jury investigation -- at least the times that the grand jury had under investigation.

We then see that Mr. Gentilcore again goes out on his investigation of these meat packing plants where the defendant had worked, and he interviews Mr. Cucurullo, who is now retired, and Mr. Cucurullo looks at the photographs and Mr. Cucurullo says, "I remember this guy. I paid him."

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2 I paid him X amount a week.

3 "Do you remember any of the other guys on this
4 list?

5 "Yes. I remember this guy," pointing out Mr.
6 Rosen. He said Mr. Rosen never got anything.

7 In the Federal grand jury, Mr. Korn stated he was
8 paying Mr. Rosen. He also indicated that the payments were
9 being made by Mr. Cucurullo. Mr. Cucurullo denied in the
10 grand jury that Mr. Rosen was paid.

11 We have tremendous credibility problems with re-)
12 spect to these three witnesses. I submit that that type of
13 evidence is cumulative in nature. It has absolutely nothing
14 to do with the charges against Mr. O'Connor here. We are
15 faced here with three incidents. We have had three witnesses
16 testify. If this jury wishes to accept the credibility of
17 these witnesses, they can go into the jury room and find the
18 defendant guilty.

19 I have purposely during the course of this trial
20 not interfered with the examination. I have not gone into
21 questions of identification, questions of intent, because
22 if they believe those people they have to naturally assume
23 that Mr. O'Connor was taking payments. I didn't go into
24 that. It has interfered with my cross-examination, because
25 it was a procedural tactic so I wouldn't open up the door
with similar acts testimony.

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To be faced now with similar act proof, similar acts which go back two years before this incident I respectfully submit not only is not relevant; not only has the U. S. Attorney failed to establish the relevancy of the issues, but it is extremely prejudicial.

We are going to be faced in the courtroom with four similar acts in connection with an indictment that has three counts. We have more similar acts than counts in the indictment.

I submit that his statement that he may not use certain material is a subterfuge to put inflammatory material before the jury. He is going to pick his best two witnesses, so I don't have an opportunity to cross-examine them with respect to the credibility aspects. It is totally prejudicial and this defendant would not have a fair trial under these circumstances.

I believe, your Honor, that by the procedure that was followed in the defense of this defendant, that in not opening the doors, in my humble opinion of the law, this evidence is inadmissible, but as I indicated earlier, when I asked your Honor to consider this and the Court did consider it, it was my purpose at that time to determine whether or not this jury should be asked any questions with regard to the possible effect that that similar act testimony

MP

275

may have had upon them in hearing this case fairly and fully from the evidence to be submitted from those witnesses.

I respectfully submit that I have been deprived of a fair and adequate jury by virtue of this evidence if it is admitted. I respectfully submit, your Honor, that on these grounds and particularly on the grounds even if your Honor feels it is relevant, which I submit that it is not, I respectfully submit that it is totally prejudicial, and it should be excluded, and I ask that your Honor allow me to supplement this record by the brief that was submitted in support of our position with regard to the facts, so that the Court can take them into consideration.

MR. LAWLER: First of all, your Honor, I would like the record to reflect that your Honor informed counsel -- and I do not believe there was any opposition at the time that you informed us -- that you would rule on the similar acts after the completion of the Government's witnesses with regard to the counts in the indictment; so counsel's claim that he was prejudiced and that he modified his cross-examination of the witnesses, your Honor -- I think that is a tactical decision that he made, but there was absolutely no reason for him to have cut short his cross-examination. He could have objected at the time that you made your decision, but I remember no such objection when you stated

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that you were going to make the decision that you are now going to make at this time.

There was no reason for him to change his cross-examination for that reason.

Many of the statements which counsel has made to you about our similar act testimony are factually incorrect. I do not wish not to refute them, because I think the statements that he made go to the credibility of these witnesses, and the fact that they gave other statements or different statements to the United States Attorney in the Eastern District or to an FBI agent has absolutely no bearing on their admission as similar acts.

If defense counsel knows of any other statements they have made to the U. S. Government, he is free to examine them about those statements. He has been mistaken about many of the statements he says they have made. If your Honor wishes, I can go into the facts.

THE COURT: I do not wish it.

MR. LAWLER: The other item, your Honor, that defense counsel alluded to, that I am just going to call the strongest witnesses that I have in the similar acts -- your Honor, the defendant has the statements that they have given to the Government. He is, of course, free to call any of these similar act witnesses that he wants to, and it

MP

277

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2 is clear, and I will be happy to admit that I just intend to
3 call the strongest witnesses that I have. There is no
4 question about that, your Honor.

5 THE COURT: All right.

6 MR. DAMIANI: Your Honor, I have one other thing.
7 Your Honor, I would also like the Court to consider this,
8 that if the Government is allowed to bring in similar act
9 testimony, whether it be two incidents or three incidents,
10 and I respectfully submit if your Honor's decision is to let
11 it in at all, I would hope that your Honor would consider all
12 of the facts that I have just related; but if the similar
13 act testimony is allowed in, then I have no choice in the
14 proper representation of my client but to go through each
15 and every establishment that my client worked in that was
16 investigated by Agent Gentilcore and at whose direction
17 these individuals were examined, because under Brady vs.
18 Maryland, they had supplied me with all the results of the
19 interviews, not only from Brooklyn, the Southern District,
20 but from Pittsburgh, Pennsylvania. I have got statements
21 in the record where this man was never asked for a time and
22 was never given a time.

23 It is going to be incumbent on me to bring these
24 individuals into court.

25 THE COURT: What do you mean, it is incumbent for

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2 you to bring them into court? How do you figure that? As
3 a matter of fact, let me interrupt you to say that I have
4 lived for the day when there is no more of this tactical
5 business between the Government and a defendant. We have
6 urged it as a Judge. "Show them what you've got."

7 Are you trying to indicate that after we have
8 succeeded in getting the Government, without waiting for
9 formal motions and arguments, we have induced them as
10 judges and appealed to their sense of fairness and got a
11 wonderful response -- they say, "Here, Defendant, here is
12 the whole bloody business. Take it." That is not what you
13 are finding fault with?

14 MR. DAMIANI: No; I am not.

15 THE COURT: So they gave you good stuff. Are you
16 saying that you should be allowed to bring in the good stuff?

17 MR. DAMIANI: Absolutely, your Honor. It is my
18 obligation.

19 *LAWLER* — I would say it is undue repetition and cumulative.

20 THE COURT: All right. I have it. Both of you
21 have been splended in your ardor. The production of similar
22 act testimony is always a weighty problem for the Judge.
23 In some circuits, as counsel for the defense has pointed
24 out, they do not allow it with the degree of permissibility
25 that our Circuit Court has endorsed, so that the state of

MP

279

the law across the land on this very issue is not one to make the trial Judge feel at ease, because what we are doing always when this problem comes up is saying this:

"Look: the Government has proof in regard to what is in the indictment. But wait a minute. When we get through with that, we want to be able to introduce other testimony outside of the indictment which goes to the intent of the defendant with respect to the acts charged in the indictment."

Very often, that prior testimony is much more conclusive, of a greater impression, than the proof in the main.

What do you do, Judge? Have you got to decide that this is better proof and, therefore, "Government, go ahead"? And if it is of an inferior quality, from polluted sources, from witnesses who, if counsel is correct, can be shown up to have been, to use simple language, plain liars with regard to the intent of this defendant with respect to acts prior to the indictment, am I supposed to say no?

In other words, what I am saying to you is that I cannot and must not pass on the quality of the evidence that is to be adduced. We have seen over and over again, in cases far more serious than the one before us, cases, for

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230

instance, where there was a conspiracy to sell enormous quantities of heroin by the kilo, where hundreds of thousands of dollars of cash were found in the premises of one participant and overwhelming evidence of violence in connection with those perpetrated acts in order to make the conspiracy succeed.

We have had that. And what kind of witnesses did the Government call to the stand? Rotters. Men from the gutter, who had to admit on cross-examination that they planned killings -- plural -- and yet the jury chose to believe them, because they brought back a verdict of conviction; and that happens over and over and over again.

So the issue really now before us is not whether these witnesses can be shown up to be liars, because it will be up to this jury to decide whether their testimony now is true or whether they have been so shaken as to the quality of their testimony, as to the veracity of it, as to reject it, in whole or in part. That is not for me to decide.

The day of truth telling, we have learned from the time we began to use our heads as lawyers, can come from the most unexpected sources, and we have learned, too, that those borne down with medals of honor from the highest educational institutions can lie as fast as the unlettered and the untutored.

MP

281

I would say that in my own experience, now forty years, almost, as a Judge and pretty nearly half a century as a fact finder, I am constantly amazed at the sources, the unexpected sources from which truth gushes forth, just as we find affection and love can come from the humblest and put to shame the affection that resides in the homes of those who have had every opportunity known to man.

So in essence the truth comes from the most unexpected sources.

In essence I am saying that I cannot and must not, as I understand the rule of law, rule on the quality of the evidence that is being offered. There is no use in my making a recital of what the law is on the subject, and I am content to have the memoranda of both counsel made a part of the record. They will be marked, in due time, by the clerk of the court as Court's exhibits. Counsel need not be ashamed of their efforts. Their efforts have been splendid, and they show industry and they show deep concern, and I am always refreshed when I see lawyers go and do battle.

The truth never comes from a flabby performance. It requires hammer blows over and over again, and the lawyers on both sides of this case have demonstrated that to the Court's satisfaction and to the ease of the Court. It has lightened my burdens, and I am appreciative of it.

MP

282

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2 Applying the law as I understand it to the testimony
3 that is contemplated to be adduced before this jury and
4 bearing in mind that if I showed any wisdom at all it was in
5 deciding that it was not for me to decide this issue at the
6 threshold of the trial but to wait and see what the Govern-
7 ment has to offer on the main case and then make up my mind,
8 not as counsel for the defense, with proper persistence has
9 demanding, even before one word was uttered before the jury,
10 even before the jury was selected.

11 I think the Judge must wait to see what the evidence
12 shows in order to determine whether, according to his sound
13 discretion, the introduction of the similar act testimony
14 would outrage a fair trial and produce more prejudice than
15 what would be gained by its admissibility.

16 I am about to conclude and say that I thank you
17 for listening to me, and my hesitant remarks are far from
18 the kind of rendition that you are entitled to, but I think
19 I can say I am satisfied that I have indicated the Court's
20 reaction to the main points raised by counsel.

21 I say right here and now that I think I would be
22 guilty of an inexcusable abuse of discretion if I denied
23 the Government's application. The Government's application
24 therefore is granted. The objections so vigorously and
25 intelligently pursued by counsel for the defense are over-

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283

1 ruled. Therefore, we will take the testimony, no matter how
2 much of a burden it is, no matter how protracted the trial
3 becomes. That is what we are here for. When a surgeon goes
4 into the belly, he doesn't know what he is going to find,
5 and when he finds something that the x-rays did not disclose,
6 he can't just close up and go home. He has to meet the new
7 challenges according to the best of his professional skill.

8 So in essence I am saying that we are not curtail-
9 ing the trial even if it should be extended beyond the time
10 already consumed. We must receive the evidence for what it
11 is.

12 That is the ruling of the Court.

13 It is now a quarter of one. I have other attorneys
14 waiting for me. They undoubtedly are saying they wish the
15 Judge would not talk so much.

16 MR. DAMIANI: May I have an exception, your Honor?

17 THE COURT: Under the rules of this Court, you have
18 an automatic exception.

19 (A luncheon recess was taken.)
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MP

Vorcheimer - direct

288

1 "When were you born?" give a date, not your birthplace or
2 your parents' names.
3

4 Now, remember that, because I don't want you saying
5 anything that is likely to cause a mistrial here.

6 THE WITNESS: Yes, sir.

7 THE COURT: All right. Concentrate on the questions
8 and remember that you are answering the questions under oath.

9 DIRECT EXAMINATION

10 BY MR. LAWLER:

11 Q Mr. Vorcheimer, what is your occupation?

12 A I am in the wholesale meat business.

13 Q By whom are you employed?

14 A J. M. Vorcheimer.

15 Q What is your position?

16 A I am part owner.

17 Q Where is the business located?

18 A 185 Fort Greene Place, in Brooklyn.

19 Q How long have you been employed by J. M. Vorcheimer?

20 A Twenty-five years.

21 Q During the years 1972 to 1975, was your business
22 located in Brooklyn, at that address?

23 A Yes, sir.

24 Q During the time period in question, did you have
25 an ownership interest in the business?

MP Vorcheimer - direct

289

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A Yes, sir.

Q During the period in question, what type of meat business were you in?

A Wholesale veal.

Q Could you give the jury some idea of the scale, the size of your operation?

A We do about a million dollars a month, within ten or twelve per cent up or down. I think that's the best way --

Q How many employees during the time period in question did you have?

A Twenty-eight, approximately.

Q During the same time period, did you buy your meat outside of New York State?

A Yes, sir.

Q Are you inspected as part of the U. S. Department of Agriculture Meat & Poultry Inspection program?

A Yes, sir.

Q How long have you been inspected?

A Since the inception of the program.

Q Are you testifying today under an agreement with the United States Attorney's office?

A Yes, sir.

Q I show you Government Exhibit Number 20 for

MP Vorchheimer - direct

1 identification. Do you recognize that document?

2 A Yes, sir.

3 Q Would you take a look at the document? How do you
4 recognize it?

5 A It has my signature on it.

6 Q What is that document?

7 A That's an agreement for me --

8 Q I am not asking you what it says.

9 A That's the agreement with the Federal office.

10 MR. LAWLER: Your Honor, the Government would offer
11 it into evidence.

12 THE COURT: Show it to counsel.

13 MR. DAMIANI: Your Honor, it is noted with a con-
14 tinuing objection, based on the motion that was previously
15 made.

16 THE COURT: As to the admissibility of prior acts
17 testimony?

18 MR. DAMIANI: That is correct.

19 THE COURT: All right. Mark it in evidence, please.

20 (Government Exhibit 20 for identification was
21 received in evidence.)

22 MR. LAWLER: Thank you.

23 The Government requests permission to read this to
24 the jury.
25

MP

Vorcheimer - direct

291

1 THE COURT: Certainly.

2 MR. LAWLER: Ladies and gentlemen, this is a copy
3 of a letter dated March 13, 1976.

4 MR. DAMIANI: March 13th?

5 MR. LAWLER: Excuse me. May 13, 1976. -- from
6 the U. S. Attorney's office in the Eastern District of New
7 York, Brooklyn, New York, as opposed to the other agreements,
8 Government's Exhibits 17, 18 and 19, which were with the
9 United States Attorney's office for the Southern District
10 of New York, which is in Manhattan, addressed to Marvin
11 Siegal, Esq., 745 Fifth Avenue, New York, New York. The
12 subject is "Investigation into Corruption in the Meat Industry"

13 Now, the letter has seven paragraphs. Your Honor,
14 I request permission to paraphrase the pertinent sections of
15 this letter.
16

17 This letter is in substance similar in all material
18 respects to the letter that was made -- or the agreement that
19 was made with the United States Attorney's office in the
20 Southern District of New York. It is not exactly the same.
21 It is written by a different office, and so it's got differ-
22 ent phrases, but the material sections are the same.

23 I am not going to take everyone's time by reading
24 every sentence of the letter, but it says that, in substance,
25 the U. S. Attorney in reaching this agreement has relied on

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Vorcheimer - direct

292

1 the representation that the only violations of Federal criminal
2 law by J. & M. Vorcheimer and its officers, directors, em-
3 ployees and agents is that they have made payments or given
4 things of value to United States Department of Agriculture
5 employees.
6

7 It also says that the understanding is that the
8 company, J. & M. Vorcheimer, in addition to its employees,
9 agents et cetera, agrees to furnish full and complete
10 information to the Federal grand jury of the Eastern District
11 of New York and to the United States Attorney's office for
12 the Eastern and Southern District of New York and to the in-
13 vestigative agents, including full and complete and truthful
14 disclosure relevant to the investigation described in
15 Paragraph 1.

16 (Mr. Lawler read further to the jury from Govern-
17 ment's Exhibit 20 in evidence.)

18 THE COURT: You understood the contents of that
19 paper, Mr. Witness?

20 THE WITNESS: Yes, sir.

21 THE COURT: You understood that the law enabled
22 the prosecutor to hold you personally to account for the
23 acts that you committed in connection with the giving of
24 money to inspectors from the Department of Agriculture, did
25 you not?

MP

Vorcheimer - direct

293

1 THE WITNESS: Yes, sir.

2
3 THE COURT: You understand that you were given, in
4 effect, an immunity, in other words that you would not be
5 prosecuted, provided you told the truth with regard to your
6 own doings in this matter of handing money to inspectors?
7 Is that not the essence of it?

8 THE WITNESS: Yes, sir.

9 THE COURT: Very well. Proceed.

10 Q Did you speak with the representative of the
11 U. S. Attorney's office in Brooklyn?

12 A Yes; I did.

13 Q Before you spoke with him, did you have some
14 understanding, had you reached an understanding with him with
15 regard to the immunity?

16 A I can't answer that question. I don't know exactly
17 what you mean.

18 Q When did you receive immunity?

19 A I believe I signed the agreement first, before I
20 spoke to the attorney --

21 THE COURT: To the assistant United States
22 Attorney.

23 THE WITNESS: To the assistant United States
24 Attorney.

25 THE COURT: All right.

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Vorcheimer - direct

2 Q And you have not been prosecuted; is that correct?

3 A That's correct.

4 Q The company has been prosecuted?

5 A That's correct.

6 Q And the company has been sentenced?

7 A That's correct.

8 Q Do you know John O'Connor?

9 A Yes.

10 Q Was Mr. O'Connor an inspector in your plant?

11 A Yes.

12 Q Do you remember when he was an inspector in your
13 plant?

14 A Some time in '73 and on several occasions, I believe

15 THE COURT: You mean subsequent, Mr. Witness?

16 THE WITNESS: Before.

17 THE COURT: Before and after? We weren't there.

18 We don't know. But you were there.

19 THE WITNESS: I don't exactly remember, but after

20 I'm sure, and before, I believe.

21 THE COURT: Can you give us an idea?

22 THE WITNESS: It was a relief assignment. No; I
23 don't, your Honor.

24 THE COURT: All right. Next question.

25 Q Do you see Mr. O'Connor here in the courtroom?

1 MP Vorcheimer - direct 295

2 A Yes; I do.

3 Q Will you point him out.

4 A He's the gentleman sitting in the middle of those
5 three gentlemen.

6 THE COURT: Indicating the defendant on trial.

7 Q Now, when you spoke with the U. S. Attorney in the
8 Eastern District -- Mr. Dawson -- and you were asked if you
9 had --

10 MR. LAWLER: Excuse me. Question withdrawn.

11 Q You were asked by Mr. Dawson to identify the in-
12 spectors you had paid?

13 A Yes.

14 Q Did you identify Mr. O'Connor at that time?

15 A No; I believe not. There were an awful lot of
16 photographs.

17 MR. DAMIANI: I object. The question has not been
18 answered.

19 THE COURT: I wish the witness would listen. I
20 don't know why Judges are put to so much trouble. I have
21 seen kids get on the stand, and they answer, "I wasn't there,
22 Judge. I saw this. I didn't see that."

23 What is so difficult? You are a grown man.

24 All right. Next question.

25 Q In Mr. Dawson's office were you shown a number of

1 MP Vorchheimer - direct 290

2 photographs?

3 A Yes.

4 Q And at that time did you pick out Mr. O'Connor's

5 photograph?

6 A No; I did not.

7 Q Did you recognize Mr. O'Connor's photograph?

8 A I don't think so.

9 Q Was there any particular reason for this?

10 MR. DAMIANI: Objection, your Honor.

11 THE COURT: Objection overruled.

12 A When I saw Mr. O'Connor, I always saw him in a

13 white coat and a helmet. The photograph of his is as he is

14 now, and that's why I didn't recognize him among all the

15 photographs.

16 Q Do you remember approximately how many photographs

17 you were shown by Mr. Dawson?

18 A Over a hundred, I would say.

19 Q Now, when Mr. O'Connor was an inspector in your

20 plant, did you give him anything of value?

21 A Yes; I did.

22 Q What did you give him?

23 A Money.

24 Q How much money?

25 A Fifty dollars.

1 MP Vorcheimer - direct 297

2 Q How often did you give him fifty dollars?

3 A Every week he was there.

4 Q Where was this payment made?

5 A In an office or in a hallway without windows, or
6 some excluded place.

7 Q And could you describe in as much detail as possible
8 exactly how these payments were made?

9 A I put the money in my hand, and I gave it to Mr.
10 O'Connor in his hand.

11 Q Did you say anything to him?

12 A Not -- not in particular. Not on every occasion.

13 Q Was anyone else present?

14 A No.

15 THE COURT: Will you try to fix dates as closely
16 as you can, Mr. Lawler. When did this start; when did it
17 end; how many times?

18 Q First of all, when were the payments generally made?

19 A Either on Thursday or Friday.

20 MR. DAMIANI: Objection to the form, "generally
21 made", unless he doesn't have any recollection, first.

22 THE COURT: Objection as to form sustained.

23 Q What day of the week were the payments made?

24 A On Friday, usually -- something --

25 Q When you say "usually", will you please expand on

1 MP Vorcheimer - direct

2 what you mean?

3 A Sometimes on a Thursday.

4 Q When were they made on a Thursday?

5 A When I thought I would be too busy on Friday or
6 I felt that if everybody else was doing it on Friday I should
7 do it on Thursday, to be less conspicuous.

8 Q Do you know approximately how many times you paid
9 Mr. O'Connor fifty dollars?

10 A For every week he was there.

11 THE COURT: That doesn't help us. We weren't
12 there. The members of the jury are strangers to this. I
13 wasn't there. I don't know what you are telling us. If you
14 don't tell us, we won't know what happened. You said that
15 you were going to tell the truth.

16 THE WITNESS: Yes.

17 THE COURT: If you are playing around, I want to
18 know it. I don't want to be bothered with people who can't
19 answer a simple question.

20 You knew what you were going to be asked about.
21 This has been on your head for weeks. You knew that you
22 would get a question dealing with when you gave the man
23 money. Didn't you turn it over in your head? Did you or
24 didn't you?

25 THE WITNESS: Your Honor, I can't remember how

1 MP Vorcheimer - direct 299

2 many weeks he was there.

3 THE COURT: I am not asking you how many weeks he
4 was there. How many weeks did you give him money, with your
5 own hands?

6 THE WITNESS: I can't remember that, either.

7 THE COURT: What do you mean, you don't remember?

8 THE WITNESS: I don't want to start off with what
9 you told me not to do. Every inspector who was there ran
10 into another inspector. I don't know who was there every
11 week.

12 THE COURT: How many inspectors did you give money
13 to?

14 THE WITNESS: Almost all.

15 THE COURT: I don't know what that means. I
16 wasn't there.

17 THE WITNESS: I don't know how many inspectors I
18 had, your Honor, in five years.

19 THE COURT: You are not getting fresh with me, are
20 you, Mister?

21 THE WITNESS: Not me.

22 THE COURT: Get off the stand. Get off there and
23 stay in the courtroom.

24 The jury is excused.

25 (The jury left the courtroom.)

MP

Vorcheimer - direct

300

1 THE COURT: Now, you stay right there. I will
2 deal with you first.

3 I have the power to direct the Government, whether
4 the Government wants to or not, to lay the matter before the
5 grand jury. Do you understand that?

6 THE WITNESS: Yes, sir.

7 THE COURT: I know exactly what has been going on
8 here, because I have had all these cases, and you know it.

9 When you start to horse around or play around
10 with a Judge and you are on the stand and you are supposed
11 to tell the truth, the gospel truth, I can detect it as fast
12 as you can detect a chunk of meat. Do you understand that?

13 THE WITNESS: Yes sir.

14 THE COURT: Do you?

15 THE WITNESS: Yes sir.

16 THE COURT: Don't you play around with justice.
17 Monkey around with your meat. Be a bribe giver, the way
18 you have. We don't have to apologize to you. You are mighty
19 lucky that you weren't prosecuted. And remember, you knew
20 that you signed a document which said that you would tell
21 the gospel truth, and if you didn't you would be prosecuted.
22 Did you not sign that?

23 THE WITNESS: Yes, sir.

24 THE COURT: What about it?
25

1 MP Vorcheimer - direct 301

2 THE WITNESS: I did sign it, sir.

3 THE COURT: Were you monkeying around with the
4 truth before me?

5 THE WITNESS: No; I wasn't sir. I don't think I
6 was.

7 THE COURT: You show respect, Mister. I will put
8 you in your place. This jury is entitled to know what went
9 on, and you are not going to finagle around with anything,
10 none of you. You were sinners. Admit it and quit trying
11 to play around on top of it.

12 You are very lucky that you are not on your way to
13 jail now. I know how these things come about. I have given
14 people immunity in my time, but, by God, they came through.
15 They told about all their murders; they told about all their
16 conspiracies.

17 I know when a fellow is monkeying around and trying
18 to cut it, and when that jury comes out, you get on the
19 stand, and if you don't tell the gospel truth, I will lay
20 the matter before the grand jury. Do you get it?

21 THE WITNESS: Yes, sir.

22 THE COURT: And you: come here (addressing Mr.
23 Kupferberg.) What is your name again?

24 MR. KUPFERBERG: Kupferberg.

25 THE COURT: Stay right there. When you were on the

1 MP Vorcheimer - direct 302

2 stand, you did some of what I have just been complaining
3 about, too.

4 I read that document. You had a dirty mouth, a
5 filthy mouth, even though you were not able to identify the
6 person. I read what you said on that tape. You've got a
7 dirty mouth, Mister. You know the score, and you try to
8 act on that stand as though you never did anything wrong in
9 your life. You, too, are a bribe giver. You were told by
10 me not to talk to anybody in that room. You thought you
11 would get away with it. I am going to hold you in contempt.
12 You get hold of your lawyer. I want him here next Thursday.
13 Do you understand that?

14 MR. KUPFERBERG: Yes, sir.

15 THE COURT: If anybody has to send you to jail and
16 I have to do it, I will be the one to do it. I have worked
17 just as hard as you in my life. I have been on my own since
18 I was ten. I have dealt with people like you. You not only
19 pick up the marbles, but you also want to lay down how you
20 are going to act and just what you are going to give. And
21 you are not going to barter or play around with justice. Go
22 play around with your meat.

23 Do you understand what I said?

24 MR. KUPFERBERG: I have to --

25 THE COURT: Get your lawyer to call us, and you will

1 MR Vorcheimer - direct 303

2 be brought down with your lawyer.

3 MR. KUPFERBERG: Yes, sir.

4 THE COURT: Get out of here.

5 (Mr. Kupferberg left the courtroom.)

6 THE COURT: (Addressing Mr. Vorcheimer:) Get back
7 on the stand.

8 (Mr. Vorcheimer resumed the stand.)

9 THE COURT: Bring in the jury.

10 (Jury in box.)

11 THE COURT: I am sorry, ladies and gentlemen, that
12 you had to step out, but I have straightened out something, I
13 hope. I will be able to tell in a short while.

14 All right. I will continue with my questioning.

15 Mr. Witness, how long has it been since you were
16 informed that you would not be prosecuted for money that you
17 gave O'Connor and other inspectors?

18 THE WITNESS: I believe --

19 THE COURT: Keep your voice up.

20 THE WITNESS: I believe the document reads May.
21 I believe it was in March, before that.

22 THE COURT: Of what year?

23 THE WITNESS: 1975; correct?

24 THE COURT: I am asking you.

25 THE WITNESS: I really don't know for sure. I don't

MP Vorcheimer - direct

304

the record in front of me.

THE COURT: How long ago was it? A year or two years ago?

THE WITNESS: I think it was two years ago, your Honor.

THE COURT: Now you were told at that time that there would come a time when you would take the stand; is that not so?

THE WITNESS: Yes, sir.

THE COURT: And you knew you would be testifying against Mr. O'Connor; is that not so?

THE WITNESS: Yes, sir.

THE COURT: How long have you known that you would be likely to be called as a witness to testify in this case?

THE WITNESS: For two years, when I signed the document.

THE COURT: All right. Didn't it occur to you that you would be asked to tell in detail what happened between you and O'Connor? Did that occur to you?

THE WITNESS: That occurred to me.

THE COURT: You knew full well, didn't you, that that was the whole guts of the investigation?

THE WITNESS: Yes, sir.

THE COURT: Now, as you sit there and concentrate,

MP

Vorcheimer - direct

305

can you tell this jury the approximate date that you first gave this defendant on trial, O'Connor, fifty dollars?

MR. DAMIANI: May I approach the side bar, your Honor?

THE COURT: No, not right now.

THE WITNESS: Your Honor, the date is on the record --

THE COURT: I didn't ask you the date on the record. What is your memory, sitting there?

THE WITNESS: The end of '73.

THE COURT: All right.

THE WITNESS: That's as far as I can remember, your Honor.

THE COURT: Do you remember on how many separate occasions you paid this defendant?

THE WITNESS: Ten or more.

THE COURT: Do you remember how many inspectors in all you gave money two?

THE WITNESS: Two dozen or more.

THE COURT: All right. Now you can come up.

(At the side bar:)

MR. DAMIANI: Your Honor, I know there was no intent or any --

THE COURT: Come on. Say what you want to say.

MP

Vorcheimer - direct

MR. DAMIANI: Well, when your Honor was questioning the witness, you indicated that he knew for approximately two years that he was going to testify about O'Connor.

THE COURT: You can go and straighten that out on cross.

MR. DAMIANI: If I may, your Honor, you said that the testimony against O'Connor was the crux of the whole case.

THE COURT: I didn't say that. He knew he was going to be a witness in the investigation. I will be glad to make that clear.

Is that all there is?

MR. DAMIANI: That's all.

(In open court:)

THE COURT: You knew for two years that you would be called to testify against other inspectors as well as O'Connor; is that not so?

THE WITNESS: That's correct.

THE COURT: You knew that the investigation dealt with inspectors, not one particular person; is that not so?

THE WITNESS: That's correct.

THE COURT: And have you testified with respect to other inspectors? Yes or no.

THE WITNESS: Yes, sir.

1 MP

Vorcheimer - direct

307

2 THE COURT: And in different courts, have you?

3 THE WITNESS: Yes, sir.

4 THE COURT: Under that same immunity; is that right?

5 THE WITNESS: That's correct.

6 THE COURT: Very well.

7 I am sorry, Mr. Lawler, but I think we have
8 straightened it out. I hope we have.

9 BY MR. LAWLER: (Continuing)

10 Q Mr. Vorcheimer, when you first spoke with the
11 U. S. Attorney, did you have your attorney, Mr. Siegal, with
12 you?13 A I don't think so. I know Mr. Siegal represented
14 me in this matter. I think I spoke to him alone.15 Q Had you discussed with your attorney the immunity
16 understanding that you had before you spoke with the U. S.
17 Government?

18 A Yes.

19 Q And I believe you testified you are not sure
20 whether the letter was actually signed?

21 A That's correct.

22 Q But was it signed on or about the date on which you
23 testified, or within the same time period?

24 A Yes; it was.

MP

Vorcheimer - direct

308

1 Q The letter is dated May 13, 1976. Were you in
2 error when you said you had known for two years?

3 A Yes; I must have been in error.

4 THE COURT: Well, now that you say you must have
5 been in error, what do you now say as to the date?

6 THE WITNESS: If I had the record in front of me,
7 I would know the dates. It happened --

8 THE COURT: Mr. Witness, don't you see: that is
9 the way the truth comes out. It isn't whether you've got
10 records. It is what the witness says when he is on the
11 witness stand. If you don't remember, you say, "Judge or
12 jury, I don't recall the date exactly, but I think it was
13 around such and such a time" or "I cannot possibly testify
14 unless I have some records in front of me."

15 That is what is expected of you. We can't bring you
16 the records, because you are going to be on the stand. We
17 don't know whether you need records. How are we going to
18 tell before your testimony comes out of your mouth? Do you
19 get that?

20 THE WITNESS: Yes, sir.

21 THE COURT: Now that you have heard that the date
22 of the agreement that gave you immunization was May of 1976
23 -- am I right, Mr. Lawler?

24 MR. LAWLER: Yes, your Honor.

MP

Vorcheimer - direct

309

1 THE COURT: Now, you remember that? You've got that
2 clearly in your mind?

3 THE WITNESS: Yes.

4 THE COURT: Do you know what month it is, now?

5 THE WITNESS: Yes, sir.

6 THE COURT: What month is it?

7 THE WITNESS: May of 1977.

8 THE COURT: So it was a year ago?

9 THE WITNESS: Yes.

10 THE COURT: Now that you remember that it was a
11 year ago that you signed that paper that gave you immunity,
12 what is your sworn testimony before this jury as to when you
13 first knew you were going to be called as a witness at the
14 trials of various inspectors?

15 THE WITNESS: A year ago, your Honor.

16 THE COURT: Thank you. Next question.

17 Q The payments that you testified you made to Mr.
18 O'Connor: were these payments loans or gifts or were they
19 made because he was a meat inspector?

20 A They were made because he was a meat inspector.

21 Q Did you pay other meat inspectors prior to the time
22 you paid Mr. O'Connor?

23 A Yes; I did.

24 Q And you paid other meat inspectors after the time

MP Vorchheimer - direct/cross

310

you paid Mr. O'Connor?

A. Yes; I did.

Q. Did you pay every meat inspector who inspected your plant?

A. With one or two exceptions.

Q. What did you expect to get from paying Mr. O'Connor?

A. Less harassment.

Q. What do you mean by that?

MR. DAMIANI: Objection, your Honor.

THE COURT: Objection overruled.

A. That if the floor was dirty, the man would let me work instead of closing me up until the floor was clean, or if something was wrong in the place, he would be available right away when it was cleaned up, instead of going for coffee for a half hour. That's harassment in the meat industry.

MR. LAWLER: I have no further questions, your Honor.

THE COURT: All right. Cross-examination

CROSS EXAMINATION

BY MR. DAMIANI:

Q. Mr. Vorchheimer --

THE COURT: Now, am I going to have difficulty having you keep your voice up, counsel? I have expended mine

1 MP Vorcheimer - cross 111

2 You will have to expend yours.

3 MR. DAMIANI: Yes, your Honor.

4 Q Mr. Vorcheimer, for what period of time did Mr.
5 O'Connor work for Arthur Vorcheimer?

6 A About ninety days.

7 Q Three months?

8 A Yes, sir.

9 THE COURT: Keep your voice up.

10 THE WITNESS: Yes, sir.

11 Q And is it your testimony that you were making
12 payments to him during the year of 1973?

13 A Yes; I believe so, sir.

14 Q Do you know what date it was that you appeared at
15 the Federal grand jury in the Eastern District?

16 THE COURT: In Brooklyn. Make it easy.

17 A No; I can't remember the date.

18 Q Do you know what day it was that you appeared at
19 the office of the U. S. Attorney -- Mr. Dawson -- in Brooklyn?

20 A No; I don't.

21 MR. DAMIANI: May I have this marked for identifi-
22 cation?

23 (Defendant's Exhibit J marked for identification.)

24 Q Mr. Vorcheimer, J. & M. Vorcheimer was owned by
25 whom in the year 1973?

1 MP Vorcheimer - cross

2 A John and Norman and Arthur Vorcheimer.

3 Q John, Norman and Arthur?

4 A Right.

5 Q Am I correct to believe that during that period
6 of time you were suffering from some disability, you were on
7 medication with some hypertension or some other illness?

8 A You are correct.

9 Q And isn't it a fact that the people actually running
10 the business were your two brothers: Norman and John?

11 A Norman. John is my father.

12 THE COURT: Wait until he is finished with his
13 question. Then just speak up so we can all hear it.

14 Q Isn't it a fact that when Mr. O'Connor was working
15 for Vorcheimer, if there were any complaints they were not
16 to go to you; they were not even to go to your father? They
17 were to go to your brother, Norman?

18 A Yes.

19 Q And during that time you were still paying Mr.
20 O'Connor?

21 A Yes, sir.

22 Q And that was in 1973 when he worked for you?

23 A Yes, sir.

24 Q Now, you just stated on the direct testimony, when
25 Mr. Lawler asked you, that you have known for some two years

1 MP Vorcheimer - cross

2 that you were going to testify against Mr. O'Connor?

3 A I made a mistake. I was corrected --

4 Q Isn't it correct that the first time you were
5 asked to testify against Mr. O'Connor was on or about March
6 7, 1977?

7 A Yes; you are right.

8 Q And isn't it a fact that it was by the efforts
9 of Special Agent Gentilcore, who came to your place of busi-
10 ness and asked you to look through some photographs and see
11 if you could identify any persons?

12 A That's correct.

13 Q And isn't it a fact that at that time you looked
14 at the picture of Mr. O'Connor and said you recalled the
15 face?

16 A Yes; that's correct.

17 Q Isn't it a fact that it is the same photograph
18 that you looked at on March 7th, that you had occasion to
19 look at at the U. S. Attorney's office before you went in to
20 the grand jury?

21 A That's almost right.

22 Q And when you went in to the grand jury, weren't
23 you shown additional photographs?

24 A Yes, sir.

25 Q And on all those occasions you didn't advise the

MP Vorcheimer - cross

314

grand jurors that Mr. O'Connor was one of those people; is that correct?

A. That's correct.

Q. And you were asked by the grand jury -- you were instructed by the grand jury that they were investigating payments to meat inspectors during the period of 1973 to the present, which was 1976, was it not?

A. That's correct.

Q. And Mr. O'Connor worked for you subsequent to the period, after the period of 1973; he worked for you in '74, didn't he?

A. Yes; he did.

Q. And you still didn't tell the grand jury that?

A. I didn't recognize him at the time.

Q. And isn't it a fact that that is not only the first time that you had occasion to see the photographs, when you were at the office of the U. S. Attorney? Didn't you have occasion to see those photographs prior to that date?

A. Not that I know of.

Q. When were you first subpoenaed by the United States Government?

A. In 1976.

Q. '76?

A. Yes.

MP

Vorcheimer - cross

315

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Q '76 or '75?

A Before the date the agreement was signed, I was asked to come down. I wasn't subpoenaed.

Q Did you ever receive a subpoena?

A No; I didn't.

Q Did you ever receive a subpoena from the Eastern District, in Brooklyn?

A No.

Q To appear before the grand jury?

A No; I was asked to come down, and I came down. Whether a subpoena was issued I don't know.

Q I see. Are you, sir a member of the Greater New York Association of Meat & Poultry Dealers, Inc.?

A Yes.

Q How long have you been such a member?

A Fifteen years.

Q Were you a member in 1975, when numerous meat packers started to receive subpoenas from the United States Attorney?

A Yes; I was.

THE COURT: Let him finish his question. This court reporter has to have an accurate record of every word that is uttered in the courtroom. You are interfering with that and making it very difficult.

MP Vorcheimer - cross

Go ahead.

THE WITNESS: Yes; I was.

Q Were you aware of the subpoenas that were issued to your brother association members?

A Yes; I was.

Q Did you have occasion to attend with those association members a meeting at the Empire State Building, at the offices of the association?

A Yes. I don't think I was -- excuse me. I don't think I was there personally.

Q You don't think you were there personally?

A That's right.

Q Do you recall whether or not that meeting was held prior to the time you were requested to come in to the United States Attorney's office?

A I don't recall.

Q That means before.

A I know what you said. I don't recall.

Q You don't recall?

A No.

Q Did you ever have occasion to attend the association meeting prior to -- before going to the U. S. Attorney's office with regard to the subpoenas that had been issued to the meat packers?

MP

Vorcheimer - cross

317

1 A. I don't recall that, either.

2 Q Well, Mr. Vorcheimer, are you telling me you could
3 not recall being with fellow members of the association in
4 a discussion with regard to subpoenas issued to the industry
5 by the United States Attorney's office?
6

7 A. I believe I spoke to Mr. Calcannon.

8 Q Who is Mr. Calcannon?

9 A He was representative of the organization. He was
10 one of the officers.

11 Q He was a former meat inspector, was he not?

12 A I don't know that. You've got me.

13 Q He was the former president of the association?

14 A Yes.

15 Q Are you on the board?

16 A No.

17 Q Did you help elect him?

18 A No.

19 Q You don't know who he was?

20 A No.

21 Q You didn't know he was a meat inspector in the
22 area in 1973?

23 A No; I did not, sir.

24 Q When did he first call you?

25 MR. LAWLER: Objection, your Honor. He didn't

1 MP Vorchheimer - cross 313

2 testify that Mr. Calcannon called him.

3 MR. DAMIANI: Withdrawn.

4 Q Did Mr. Calcannon call you?

5 A I don't know. Either I called him or he called
6 me.

7 Q Was the conversation you had with Mr. Calcannon
8 before you came to the U. S. Attorney's office in Brooklyn?

9 A Yes.

10 Q Do you know the attorney for the association?

11 A Mr. --

12 THE COURT: Yes or no. He didn't ask you the name
13 of the attorney.

14 A Yes; I do.

15 Q And he was the attorney of all of the meat packers
16 and the association; is that correct?

17 A That's correct.

18 Q Would that be a Mr. Milton Zahn?

19 A That's correct.

20 Q And as a result of Mr. Zahn's efforts, were you
21 advised to obtain the services of Mr. Siegal with regard
22 to these subpoenas?

23 A Yes, sir.

24 Q And you in fact did obtain the services of Mr.
25 Siegal, did you not?

MP Vorcheimer - cross

319

A. Yes.

Q. And isn't it a fact that subsequent to the issuance of those subpoenas the packers appeared at the grand jury and entered the grand jury and claimed their privilege?

A. That's correct.

Q. Did you appear before the grand jury?

A. Yes.

Q. Prior to this date, prior to the August '76 date?

A. No; I appeared with the rest of the packers.

Q. At the time that their immunity was claimed?

A. Yes.

MR. DAMIANI: May I ask for a copy of that grand jury testimony?

MR. LAWLER: Your honor, I don't think the witness understands the claim of privilege.

THE COURT: I have great regard for counsel on both sides, and I have complimented you up to this minute. Now, if you want me to strike everything of a complimentary nature I will do it. Once more you do that by using language that I have reminded you repeatedly is not generally understood. Get down to the market place, will you? That's life, whether you and I like it or not. That's the only way to make people understand: to talk language that is bound to be generally recognized.

MP

Vorchheimer - cross

320

Try it again, won't you, counsel?

Q On June 8, 1976, you appeared before the grand jury in Brooklyn and testified?

A Yes, sir.

Q At that time you testified with immunity. You couldn't be prosecuted for anything you said.

A I don't know how to answer that question.

Q Was that the only time you appeared before the grand jury or was there some time before?

A I don't remember. I believe that was the only time.

Q Do you recall ever taking the Fifth Amendment or refusing to answer on the grounds that you would incriminate yourself?

A No; I never did that.

Q Do you know of any other packers who did that prior to --

THE COURT: No, no. You know you can't ask that.

MR. DAMIANI: Withdrawn.

THE COURT: Next question.

Q Prior to going to the U. S Attorney's office and prior to going and testifying before the grand jury on June 3, 1976 and while you were represented by Mr. Siegal, did you have occasion to go to the office of the Meat Packers

1 MP Vorcheimer - cross

321

2 Association at any time before the date of that appearance
3 in the grand jury to review photographs of meat inspectors
4 that -- of meat inspectors?

5 A I don't even know where the office of the associ-
6 ation is.

7 THE COURT: Then your answer is no?

8 THE WITNESS: Yes.

9 THE COURT: Strike and disregard his answer, ladies
10 and gentlemen of the jury. Make up your minds, as you look
11 upon him, whether he is to be believed or disregarded.
12 That is one of your functions.

13 Next question.

14 Q Mr. Vorcheimer, there is no question you did pay
15 inspectors; is that correct?

16 A That's correct.

17 Q In fact, you made payments to inspectors on April
18 25th of 1975, May 23rd of 1975 and June 13th of 1975 and
19 May 20th of 1975; is that correct?

20 A I believe so.

21 Q Well, were you so advised by either your own at-
22 torney or the U. S. Attorney prior to entering into the agree-
23 ment and this immunity?

24 A I wasn't -- I don't recall.

25 Q Did you know a meat inspector by the name of

1 MP Vorcheimer - cross

2 Vincent Papa?

3 A Yes; I did.

4 Q And isn't it a fact that on those dates, the dates
5 of April 25th, May 23rd, May 30th and June 13th, that you
6 made payments to Mr. Papa?

7 A I'm not sure of the dates, but I did make payments
8 to Mr. Papa.

9 Q And you were so told that these were the items
10 that the U. S. Attorney's office had with regard to your
11 complicity in a crime; is that correct?

12 THE COURT: Wait a minute. What do you mean by
13 "These items"? He hasn't admitted those dates. Don't
14 give him a question like that when he has already told you
15 he doesn't know the dates.

16 Q Was it these payments to Mr. Papa that you were
17 informed was the basis of the action that the U. S. Attorney
18 was going to take against you?

19 A I don't recall. I was informed -- I was informed
20 that there was evidence against me. I wasn't --

21 Q Were you informed that one of the agents whom you
22 made pay-offs to was in fact equipped with a body recorder?

23 A Yes.

24 Q As a result of this information that was given
25 to you about your involvement in this criminal activity you

1 HP Vorcheimer - cross 323

2 did come to an agreement, right? -- a deal with the United
3 States Attorney's office in the Eastern District, in Brook-
4 lyn?

5 A. Yes.

6 Q. And that is where your establishment was; that is
7 where your business was: in Brooklyn; is that correct?

8 A. That's correct.

9 Q. And that is where Mr. O'Connor worked during the
10 period of 1973 and 1974?

11 A. That's correct.

12 Q. And during that grand jury proceeding -- and when
13 you were asked before you went into that grand jury proceed-
14 ing by the U. S. Attorney to identify meat inspectors that
15 you paid from January of 1973 to the date of your testifying
16 in June of 1976, you did not indicate you paid Mr. O'Connor;
17 is that correct?

18 A. I didn't recognize his photographs.

19 Q. And it was only in March, when Mr. Gentilcore came
20 to you and asked you now to look through the photographs of
21 a number of people who were indicted in this District,
22 that you then selected Mr. O'Connor?

23 A. Yes.

24 Q. Was that photograph any different from the one
25 that you had looked at before?

1 MP Vorcheimer - cross

2 A Not to my knowledge.

3 Q Isn't it a fact that when you saw that photograph
4 what you said to Agent Gentilcore was, "I remember his face.
5 I paid every inspector. I must have paid him, too, while he
6 worked here"?

7 A That could be so.

8 THE COURT: Well, is that so? Is that so, actually?
9 Now, as you sit here and testify before this jury and this
10 Judge, is it that it could be so or that you are positive or
11 that you are uncertain, or what is your testimony?

12 THE WITNESS: I don't know if those are my exact
13 words, but that is so.

14 THE COURT: What is so?

15 THE WITNESS: That I did pay every inspector,
16 almost every inspector who worked in my place.

17 THE COURT: You know that we are not talking
18 about every inspector. You know that this question was
19 directed to this defendant. Do you know that?

20 THE WITNESS: Yes.

21 THE COURT: Now, what I want to know is: it could
22 be so, that he was the man, or are you positive that this
23 defendant was the inspector, or what is it that you want to
24 tell us?

25 THE WITNESS: I'm positive that I paid this

1 MP Vorchelmer - cross

2 Inspector.

3 THE COURT: Next question.

4 MR. DAMIANI: Is your Honor through?

5 THE COURT: Next question.

6 Q You are positive now, but on March the 7th, 1977,
7 you indicated to Mr. Gentilcore you remember the face, "he
8 was an inspector. I must have paid him."

9 A That is what I -- I don't know how you want it
10 answered.

11 Q I wasn't there.

12 A No.

13 THE COURT: Now, he is asking you. Don't play
14 around with us, Mister.

15 THE WITNESS: I don't know what you are asking me.

16 THE COURT: He asked you a very simple question:
17 is that what you said?

18 THE WITNESS: Yes. ✓

19 THE COURT: Next question.

20 Q And when you refer to the manner in which payment
21 was made, again are you referring in general to the manner
22 in which payment was made to inspectors, either in the hall-
23 way or in the room with nobody there, this hallway with no
24 windows?

25 A Yes. ✓

MP Vorcheimer - cross

326

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Q That's in a general way?

A Generally.

Q Do you have a recollection of a particular date when you paid Mr. O'Connor?

A No; I don't.

Q Did you give the U. S. Attorney's office here or Mr. Gentilcore here on March 9, 1977, any information other than the fact that you said you paid John O'Connor?

A Not to my knowledge.

Q Do you have any such information, any other proof?

A No, sir.

Q It's against the law in your business, is it not, Mr. Vorcheimer, to offer payment to a meat inspector?

A Yes; it is.

Q If Mr. O'Connor had made a similar allegation against you, that you had made an offer, do you agree that it would be most difficult, if not impossible to determine who was telling the truth?

MR. LAWLER: Objection, your Honor.

THE COURT: Objection sustained. That is argument to the jury and to the Judge. You have brought that up before. I don't blame you for being persistent, but I am going to be persistent with the ruling.

Anything else now, counsel?

MF

Vorcheimer -

327

MR. DANIEL: No further questions at this time.

THE COURT: Take the jury out for a few minutes, Mr. Clerk. I want to confer with counsel.

(Recess.)

(Jury in box:)

THE COURT: Ladies and gentlemen, I had a talk with counsel, and we all think, the Judge as well as counsel, that perhaps a word ought to be said to you with regard to the receipt into evidence of testimony dealing with acts allegedly committed prior to the dates in the indictment.

This witness on the stand now is testifying with regard to a period before the dates in the indictment. Do you understand that?

JURORS: Yes.

THE COURT: Just make it known that you understand; otherwise, I will break it down.

All right. You've got that.

Now, why do we let that testimony in? What has that got to do with the charges in the indictment? The indictment says, in effect, that this defendant, on three occasions, giving the dates, accepted money while he was an inspector in meat plants. Then why do we listen to any testimony covering a period outside of the period set forth in the criminal charge, embraced in the indictment?

1 MP Vorchheimer -

2 Please understand that the law says that such
3 testimony may be received -- and that is the reason we have
4 received it -- not to prove bad character -- it has nothing
5 to do with that at all -- not to prove bad character of the
6 defendant but to furnish additional proof relating to the
7 intent of the defendant with respect to the commission of the
8 acts charged in the indictment, because, you see, he has to
9 have the intent to take it, knowingly and wilfully take the
10 money, and this is additional evidence that you can throw
11 into that area of the total testimony in order to determine
12 whether or not you are convinced beyond a reasonable doubt
13 that the defendant had the intent to knowingly, purposely,
14 wilfully, intentionally take the money.

15 Do you understand now why it is that that prior
16 testimony dealing with prior events is received in to evi-
17 dence? It is only for that specific purpose and no other
18 purpose, and you are forbidden to use that testimony concern-
19 ing prior dates for any other purpose than what I just said.
20 It is additional evidence touching upon the intent, the
21 plan, the development of an idea, so to speak, by the de-
22 fendant with respect to the acts charged in the indictment.

23 Mr. Borne, did you get it?

24 A JUROR: I certainly did.

25 THE COURT: And the other jurors? You got it?

1 MP Vorchheimer - 329
2 Who didn't quite get what I said? It's not too easy to grasp,
3 and don't be ashamed if you don't understand it. Hold up
4 your hand.

5 I have done this all of my judicial life. I am
6 here to make it crystal clear to you, and if you don't under-
7 stand, I will break it down a little further.

8 Is everybody clear on it now? Very well. Go
9 ahead.

10 MR. DAMIANI: Your Honor, at this time I would
11 make an offer into evidence of the employment records of
12 John O'Connor for the period of 9/16/73 and 9/22/73 to
13 January 5, 1974, unless they are already within the purview
14 of the evidence in Government's Exhibits 1, 2 and 3.

15 THE COURT: Well, I can't resolve that. That is
16 up to you and your opponent. You know more about that than
17 I do. You know what the records show.

18 Any further questions of this witness? What you
19 have just offered has nothing to do -- unless there is some-
20 thing I don't know about it.

21 MR. LAWLER: Your Honor, I would like to speak at
22 the side bar, if I may.

23 THE COURT: Must that be introduced now?

24 MR. DAMIANI: No, your Honor. It can wait.

25 THE COURT: All right. Is there anything else of

1 MP Vorcheimer - redirect

2 this witness?

3 MR. DAMIANI: Not of this witness.

4 THE COURT: Tell me whether you have any redirect
5 examination.

6 MR. LAWLER: I do, your Honor.

7 THE COURT: Go ahead, then.

8 REDIRECT EXAMINATION

9 BY MR. LAWLER:

10 Q Mr. Vorcheimer, when you first went down and spoke
11 with Mr. Dawson, you were shown a series of photographs; is
12 that correct?

13 A Yes.

14 Q Approximately how many photographs were you shown?

15 A Approximately a hundred.

16 Q And were you asked to pick out inspectors that you
17 had paid money to?

18 A Yes.

19 Q Did you go through the photographs?

20 A Yes.

21 Q Did you pick out a number of inspectors?

22 A Yes.

23 Q Do you remember how many, approximately, you
24 picked out?

25 A No; I don't.

1 MP Vorchheimer - redirect

2 Q Would you estimate that it was approximately a
3 dozen?

4 A I can't --

5 MR. DAMIANI: Objection to the relevancy, your
6 Honor.

7 THE COURT: Objection overruled, but I would like
8 to say that it was somewhat leading.

9 Q Was it less than fifty inspectors?

10 A Yes; I believe it was less than fifty.

11 Q You do not remember the exact number?

12 A No. No; I don't.

13 Q In March of 1977, did Mr. Gentilcore of the FBI
14 visit you?

15 A Yes; he did.

16 Q Did he show you a number of photographs?

17 A Yes.

18 Q Do you remember exactly how many photographs?

19 A Not exactly.

20 Q Do you have an estimate of how many photographs?

21 A I would say under twenty.

22 Q Did he ask you to pick out the inspectors that
23 you paid?

24 A Yes.

25 Q Did you do so?

1 MP Vorchelmer - redirect

2 A Yes; I did.

3 Q Do you remember how many people you identified
4 at that time?

5 A No; I don't.

6 Q Do you remember if you identified Mr. O'Connor
7 at that time?

8 A I was -- no; I don't remember exactly that I
9 identified him, but I was told I identified him.

10 THE COURT: We don't care what you were told. What
11 does your memory tell you to tell us, under oath?

12 THE WITNESS: I -- excuse me?

13 THE COURT: What does your memory tell you to tell
14 us, under oath? You took an oath here. All I want to know
15 is, what do you say is your testimony on that point? I
16 don't care what someone else has. We don't care about some
17 other record in connection with this question. All we want
18 to know is what do you, the witness on the stand, a sworn
19 witness, what do you say?

20 THE WITNESS: At that time, I identified the in-
21 spectors that I had paid off.

22 THE COURT: And did that include this defendant
23 on trial?

24 THE WITNESS: Yes; I did.

25 THE COURT: Did you pick out his picture?

1 MP Vorcheimer - redirect 333

2 THE WITNESS: Yes; I did.

3 THE COURT: Did you have any doubt about his pic-
4 ture?

5 THE WITNESS: None at all.

6 Q Did you have any doubt about whether you had paid
7 Mr. O'Connor?

8 A No, sir.

9 Q So in March of 1977, when you were shown the photo-
10 graphs by Mr. Centilcore, you said you identified, you picked
11 out Mr. O'Connor's photographs?

12 A Yes, sir.

13 Q And you identified him as someone you had paid?

14 A Yes, sir.

15 Q Did you identify him as someone you had paid, or
16 did you say, "If he's an inspector, I must have paid him"?

17 A No. I identified him as someone I had paid.

18 THE COURT: Mr. Witness, you know the difference
19 between those two, don't you?

20 THE WITNESS: Yes.

21 THE COURT: One is bound on your oath, and the
22 other, you say you must have paid if he was an inspector.
23 That is not the equivalent, is it?

24 THE WITNESS: No, sir.

25 THE COURT: Well, what do you say now, under oath?

1 MP Vorchelmer - redirect 334

2 THE WITNESS: I identified Mr. O'Connor as one of

3 the inspectors I paid.

4 Q Is there any doubt in your mind right now as to

5 whether Mr. O'Connor worked in your plant -- excuse me --

6 was an inspector in your plant?

7 A No doubt at all.

8 Q Is there any doubt in your mind right now that you

9 paid Mr. O'Connor?

10 A No doubt at all.

11 THE COURT: Is there anything that you have testi-

12 fied before this jury and this judge from the moment you were

13 sworn today up to this very instant that you want to take

14 back, that you want to alter, that you want to modify or

15 that you want to do anything with except let it stand as

16 the truth?

17 THE WITNESS: I want to let it stand as the truth.

18 THE COURT: You have no corrections to make?

19 THE WITNESS: None that I know of, your Honor.

20 THE COURT: All right.

21 Q Is there any doubt in your mind --

22 MR. LAWLER: Question withdrawn.

23 Q Was there any doubt in your mind when you spoke

24 with Agent Gentilcore?

25 A No; there wasn't. No doubt in my mind.

1 MP

Vorcheimer - redirect

335

2 THE COURT: As to what? I think you had better
3 make that clear.

4 THE WITNESS: Well --

5 THE COURT: Wait a minute. You had better wait
6 for the question.

7 Q Was there any doubt in your mind when you spoke
8 with Mr. Gentilcore about whether you had paid Mr. O'Connor?

9 A No, sir. There was no doubt in my mind.

10 Q Did Mr. Gentilcore, when he spoke with you, tell
11 you that you had to identify someone?

12 A No.

13 Q Did he give you any instructions that you were re-
14 quired to tell him anything other than identify the inspect-
15 ors whom you had paid?

16 A No.

17 THE COURT: Did he suggest anybody, is what the
18 Government is trying to get. Did he give you a name or did
19 he point to a photograph and ask, "Is this the guy?" or;
20 "Is that the guy?" Did anything like that occur?

21 THE WITNESS: No, sir.

22 THE COURT: Next question.

23 Q He showed you a series of photographs -- you
24 estimated less than fifty -- and he asked you to identify
25 the inspectors that you had paid?

1 MP Vorchelmer - redirect

2 A Yes, sir.

3 Q Do you remember, as you testify now, what your
4 exact words were to Mr. Gentilcore when you identified Mr.
5 O'Connor?

6 A No; I don't remember my exact words. I'm sorry.

7 THE COURT: I think, since you have opened it, you
8 had better complete it, Mr. Lawler, as to what else if any-
9 thing this witness recalls took place on the occasion of the
10 conference that Mr. Gentilcore had with him.

11 Q What else, if anything, took place on the occasion
12 of that March visit from Mr. Gentilcore of the FBI?

13 A I'm sorry. I don't remember anything else taking
14 place.

15 THE COURT: After you picked out the photographs
16 on that occasion, did you ever at any time take back anything
17 that you said with regard to the photographs?

18 THE WITNESS: Not that I know of, your Honor.

19 THE COURT: What do you mean by that?

20 THE WITNESS: I didn't take anything back.

21 THE COURT: Next question:

22 "Not that I know of" -- is that the same to you
23 as "No"?

24 THE WITNESS: No. That's the same as "I really
25 don't remember, your Honor."

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Vorcheimer - redirect/recross

336A

THE COURT: Then say you don't remember.

THE WITNESS: I really don't remember.

THE COURT: That is your answer under oath?

THE WITNESS: Yes; it is.

Q But you do not remember now saying to Mr. Gentilcore,
"If he was an inspector in my plant, I must have paid him"?

A. No; I don't remember that now.

MR. LAWLER: I have no further questions, your
Honor.

RECROSS-EXAMINATION

BY MR. DAMIANI:

Q Do you have any recollection of not having said
that to Mr. Gentilcore?

A. No; I don't have any recollection.

Q Is there a possibility that you did say that to
Mr. Gentilcore?

A Yes; it's a possibility.

Q Isn't it a fact that when you selected the photo-
graphs at the U. S. Attorney's office in the Eastern Dis-
trict, it was much less than fifty of the number you selected?

A I don't know. I can't answer that question.

THE COURT: You mean you don't remember?
That is your answer, "I don't know"?

THE WITNESS: I don't remember how many I selected.

1 MP Vorchelmer - recross

2 THE COURT: Then say so.

3 THE WITNESS: It was less than fifty.

4 MR. DANIAHI: Will you mark this for identifica-
5 tion, please?

6 (Defendant's Exhibit L marked for identification.)

7 Q Mr. Vorchelmer, I show you Defendant's Exhibit L,
8 which has been marked for identification. Will you look at
9 that document, and does that document refresh your recollec-
10 tion as to the number of photographs you selected while at
11 the U. S. Attorney's office?

12 THE COURT: In Brooklyn?

13 Q (Continuing) In Brooklyn.

14 THE COURT: Now, all I want you to do is look at
15 it. Don't tell us what it is. Just tell us if it triggers
16 your memory. Does it or doesn't it?

17 THE WITNESS: It does refresh my recollection.

18 THE COURT: All right. Now, now that your recol-
19 lection is refreshed, what do you remember?

20 THE WITNESS: There are ten names on there.
21 I know I selected them. I don't know if I selected any more
22 or not, but those I did select.

23 THE COURT: All right. Next question.

24 Q It is your testimony, then, that it is possible
25 that you selected more?

NP Vorchheimer - recross

338

2 A Yes.

3 Q But you did not select John O'Connor at that par-
4 times time?

5 A Yes, sir.

6 Q Yes, you did?

7 A Yes, I didn't.

8 Q And that was neither in the U. S. Attorney's
9 office, before you went to the grand jury, nor before the
10 grand jury?

11 A That's correct.

12 Q Now, when Agent Gentilcore came to see you on this
13 March 8th date in 1977, did he tell you what he was here for
14 or what he was seeing you for?

15 A In a general way. Not specifically.

16 Q I see. Did he tell you, "I am going to show you
17 some photographs of some meat inspectors that were indicted
18 in the Southern District. I want you to take a look at them,
19 Arthur"?

20 A I believe so, or something to that effect.

21 Q And did he indicate to you that Mr. O'Connor was
22 coming up for trial, and he wanted you to review this
23 sheet?

24 A Not that I know of.

25 Q Do you recall specifically picking out any

1 MP Vorcheimer - recross/redirect

2 particular photograph and saying, "This man I paid"?

3 A Yes.

4 Q But when you came to O'Connor, you said, "I re-
5 member this man"?

6 A Yes. Yes; I believe so.

7 Q And you also indicated, "If he was an inspector
8 in my plant, I must have paid him", did you not?

9 A I can't answer that. I don't recall.

10 MR. DAMIANI: No further questions.

11 THE COURT: Anything further?

12 REDIRECT EXAMINATION

13 BY MR. LAWLER:

14 Q When you spoke with Agent Gentilcore, did you tell
15 Mr. Gentilcore -- did you pick out Mr. O'Connor's photo-
16 graph?

17 A Yes; I did.

18 Q Did you tell Mr. Gentilcore that you had paid Mr.
19 O'Connor?

20 A Yes; I did.

21 Q Was there any doubt in your mind that you had paid
22 Mr. O'Connor?

23 A None at all.

24 Q Then is it possible --

25 MR. LAWLER: Question withdrawn.

 Q Did you say to Mr. O'Connor -- excuse me -- did you

1 KP Vorheimmer - redirect 240

2 say to Mr. Gentilcore; "If he was an inspector in my plant,
3 I must have paid him?

4 A I can't recall that -- saying that.

5 Q Is there any doubt in your mind that you paid Mr.
6 O'Connor?

7 A None at all.

8 Q Was there any doubt in your mind that he was an
9 inspector in your plant?

10 A No.

11 Q For what reason would you have said to Mr.
12 Gentilcore, "If he was an inspector in my plant, I must have
13 paid him" if you were sure that he was an inspector and you
14 were sure that you had paid him?

15 THE COURT: Wait a minute. He says he has no
16 memory of that. He said he didn't recall that. He didn't
17 say he said it. Counsel on the other side brought it up,
18 as he had a perfect right to, and the jury heard his testi-
19 mony; but your question is predicated on his admission that
20 he said it, but he said he has no recollection of saying it.

21 (To the witness:) Am I wrong? Is it your testi-
22 mony that you don't recall saying that to Mr. Gentilcore?

23 THE WITNESS: Yes. Thank you, your Honor.

24 THE COURT: Don't thank me. I just want the
25 truth.

1 MP

Vorcheimer -

2 MR. LAWLER: No further questions.

3 THE COURT: All right. Just wait a minute.

4 I repeat my question of a little earlier:

5 As you go over in your own mind everything that
6 you have said to this jury and this Judge today from the
7 moment you were sworn up to this very instant, is there
8 anything that you said that you would like to withdraw,
9 change, alter or modify, Mr. Witness?

10 THE WITNESS: No, your Honor.

11 THE COURT: Do you recognize that you said in the
12 agreement that your testimony on the witness stand was to
13 be the gospel truth? Is that not so?

14 THE WITNESS: Yes, your Honor.

15 THE COURT: Do you still believe that if you don't
16 tell the gospel truth to this jury, you might be prosecuted,
17 as the Government provided for in the agreement which you
18 signed?

19 THE WITNESS: Yes; I do.

20 THE COURT: Do you think that was a piece of
21 fakery that you can play around with, or do you think that
22 the Government really meant business when they put that in
23 the agreement?

24 THE WITNESS: I think the Government meant busi-
25 ness, your Honor.

1 HP Vorcheimer - 342

2 THE COURT: And what do you think right now, as
3 of this moment? Do you think the Government might or might
4 not, or what do you think?

5 THE WITNESS: I am here, your Honor. I wouldn't
6 be here if I thought it were any different, that they might
7 not.

8 THE COURT: All right. Step down.

9 (Witness excused.)

10 THE COURT: All right. We have come close to half
11 past four. I am going to ask the jury to be good enough to
12 come tomorrow morning and to tell me now if you can't be here
13 at nine o'clock, because I think it is insupportable to keep
14 others waiting who had to go through the same thing that you
15 and I have to go through in order to keep our appointments.
16 If there is any problem at your homes, if there is any ill-
17 ness of any kind that requires that you be at home at a
18 time that would make it impossible for you to be here at
19 nine o'clock in the morning, tell me. I will understand.
20 I have been around long enough to understand all these
21 things. They are human. But when I ask you, please be here
22 at nine o'clock, I am going to assume you will be here unless
23 you now speak up and tell me why you can't make it. I will
24 understand perfectly.

25 Is there anyone who wants to tell me anything as to

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2 why you can't be here tomorrow morning at nine?

3 All right. Then I will see you tomorrow morning at
4 nine o'clock, and we will work until one o'clock tomorrow,
5 and remember about remaining absolutely silent about the
6 testimony in this case or anything else about this case.

7 Thank you very much.

8 (The jury left the courtroom.)

9 MR. DAMIANI: For the record, your Honor, I just
10 wanted to make an application with regard to the instructions
11 given. I did request the instructions. I would just take
12 exception to one portion of the instructions which had to
13 do with the plan, when your Honor mentioned a plan in connec-
14 tion with the admissibility of the testimony with regard to
15 that issue. I respectfully submit that there is no issue
16 regarding any plan in this particular case, and I would
17 except to that portion.

18 THE COURT: The plan referred to, as I interpret
19 the language of the opinions on the matter, refers to the
20 method by which the accused undertook to take money. That
21 is, not one lump sum but repeatedly over a period of time,
22 week after week. That is what the proof says, and that is
23 what the language deals with, as I understand it, that it
24 is supportive of a plan of operation of the defendant.
25 But you have made your notation, and I have given you the

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2 best answer I am capable of.

3 MR. DAMIANI: Thank you, your Honor.

4 (Adjourned to May 20, 1977, at 9:00 a.m.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

- v -

76 Cr/ 1030 (IBC)

JOHN J. O'CONNOR,

Defendant.
-----X

This memo is offered in support of defendant's contention that exculpatory evidence sought to be elicited from certain undercover F.B.I. agents is admissible.

Federal Rules of Evidence, Sec. 401, Definition of
"Relevant Evidence" provides:

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The court has admitted "similar act testimony" for the purpose of showing Mr. O'Connor's intent and the presence of a plan or continuing activity. The exculpatory evidence which the agents would give is offered to affect the jury's opinion as to the probability of O'Connor's criminal intent and his participation in a continuing criminal plan. For this purpose, it is clearly relevant exculpatory evidence.

The Government is apparently seeking to object to the introduction of this exculpatory testimony as hearsay. There is no doubt that the proffered evidence is not hearsay. The agents would be in court, under oath, subject to cross examination, and testifying about

transactions and conversations that they observed or participated in. This is no more hearsay than the testimony offered by the three government witnesses when they testified as to alleged transactions and conversations they had individually with O'Connor.

If defendant sought to introduce mere records made by the agents concerning their investigations, even those records would be admissible. The record would, of course, be hearsay in that case, but would clearly be admissible under Federal Rules of Evidence, Sec. 803 (6) as records of regularly conducted activity. In Hawkins v. Gorea Motor Express, Inc., 360 F. 2d. 933, 934 (2d. Cir. 1966), the court allowed police reports into evidence under this subsection, saying:

"The report was based entirely on information derived from the trooper's own observations of the accident scene and from conversations with the two drivers, who were hardly bystanders."

This is not the kind of situation addressed in the leading case of Johnson vs. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), in which the police officer made a report based on the observations of other witnesses. Here, it would be as if the policeman in Johnson v. Lutz, Supra, actually saw the accident himself, and proceeded to make out the report which it was his duty to file.

Additionally, if the court determined that the proffered testimony is hearsay, we contend that it falls within the exception provided by Federal Rules of Evidence, Sec. 803 (24) (Other Exceptions), which provides, in pertinent part:

"Other exceptions. - A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

See generally United States vs. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.) aff'd. 540 F. 2d. 574 (2d. Cir. 1976).

There are guarantees of trustworthiness equivalent to the other twenty-three exceptions because of the confidential relationship between Carpenter and O'Connor and the reliability of the reporting by the agent. The issues of intent and continuing plan have been "Sharpened" by the introduction of similar act testimony, and the proffered evidence is material in that it tends to make less likely defendant's alleged criminal intent and continuing criminal plan. Defendant has no other evidence on this point other than the government investigations. As noted in our opening, we are faced with the necessity of proving a negative. Lastly, it is only fair that defendant be granted a reasonable opportunity, at least equivalent to the government's, to repair damage done by similar act testimony which the court has allowed in. In that spirit, we note the following from a Comment quoted in Weinstein's Evidence at p. 803-248:

"The presumption of innocence and the right to be heard on the charge would be merely hypocritical slogans if the accused were allowed to deny the charge against him but not to introduce any relevant evidence in his behalf. Yet in some cases in which the only exculpatory evidence available to the defendant is hearsay, this hypocritical situation results, even though the circumstances may suggest that the hearsay evidence is highly reliable."

McCORMACK & DAMIANI
Attorneys for Defendant
455 Route 304
Bardonia, New York 10954

-----X

- v -

JOHN O'CONNOR, :

0000 0001 0010 0011 0100 0101 0110 0111 1000 1001 1010 1011 1100 1101 1110 1111 X

Defendant has stated that he intends to call to the stand an FBI undercover agent who allegedly had conversations with the defendant and to whom the defendant allegedly made self serving exculpatory remarks. Defendant has indicated that he intends to elicit said statements from the FBI agents. Such statements of the defendant are hearsay and should not be admitted.

Rule 801(c) of the Federal Rules of Evidence defines hearsay "as a statement, other than ^{one} ~~are~~ made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted."

Rule 801(d)(2) provides that an admission by a party ^Capparent is not hearsay if the statement is offered

PFL:jp
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against him. The statements in issue here though made by the defendant are also to be offered by the defendant and thus clearly are not admissions.

The self serving statements in issue were made out of court by someone other than the declarant and are being used to prove the truth of the matter asserted. Thus they are hearsay and will be inadmissible unless they fit within one of the available exceptions.

The only possible exception available to the defendant is the so called "state of mind" exception Rule 803(3). However, defendant has already conceded that his "state of mind" or "intent" is not in issue. See, Defendants Memorandum of Law Regarding the Exclusion of Proof of Similar Acts, p. 4 which reads as follows:

....He does not intend to claim that he received the bribes, but without the requisite intent or knowledge. Nor does he contend that he received money from anyone in the meat industry by accident or mistake. His claim is simply that he did not receive the money or goods as charged in the indictment.

The statute requires only that the defendant intend to take the money. Since the defendant has conceded that such intent is not in issue any other "intent" or "state of mind" which the statements show is simply not

FL:jp
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relevant.* For example, the state of mind of the agent is certainly not relevant. United States v. Kaplan, 510 F.2d 606 (2nd Cir. 1974), rehearing denied.

Defendant has also argued that he should be allowed to put on the agent and ask the questions even if the answers will be inadmissible. His rationale is that in his opening he said what he would show and he should at least be given the opportunity to do so in front of the jury. If the defendant wishes to put into evidence his exculpatory statements he can easily do so by taking the stand and testifying.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

RICHARD F. LAWLER
Assistant United States Attorney

- Of Counsel -

* It is also clear that the statements would not be probative of intent in any case since they apparently do not indicate that defendant took the money as a result of mistake or accident.

Date of transcription 3/9/77

DAN M. DI CARLO, part owner of Jefferson Poultry Company, Inc., 320 South Mill Street, New Castle, Pa., telephone number 658-9064, examined a photograph shown to him by the interviewing Agent, then identified the person represented therein as being JOHN J. O'CONNOR, a U. S. Department of Agriculture Meat Inspector who was assigned to their company in 1975.

DAN DI CARLO stated that the company is primarily a distribution plant, with most of its products coming in and going out in the same containers. He stated, however, some of their incoming product is further processed, thereby necessitating the assignment of a Meat Inspector. He further advised that O'CONNOR generally came to the company early each morning, but sometimes arrived around noon to perform his inspections. He stated that all suggestions which O'CONNOR made concerning alleged deficiencies in their operations, were promptly acted upon and corrected. He advised there was never any occasion wherein O'CONNOR found it necessary to cite them for a long-standing violation, or to threaten a shutdown of their operation.

DI CARLO stated in his opinion, the company is an exceptionally good operation and noted that in 1976 a "doctor" sent by the U. S. Department of Agriculture gave them a rating of 3, in a scale in which 4 was the highest possible mark.

DAN DI CARLO positively stated that on no occasion did O'CONNOR ever solicit a payoff of money, meat products, or anything else of value from any member of the Jefferson Poultry Company, and further advised that at no time did they ever attempt to influence O'CONNOR in the performance of his duties by offering him a payoff.

Interviewed on 3/8/77 at New Castle, Pa. Pittsburgh 52-230
New Rochelle 58-1821-74
by SA RICHARD A. OBERLANDER/mpj 3/9/77
Date dictated _____

Date of transcription 3/9/77

JOSEPH P. BERKELY, owner of Berkely's West Side Market, 914 West Washington Street, New Castle, Pa., telephone number 652-6721, examined a photograph shown to him by the interviewing Agent and identified the subject of this photograph as being JOHN J. O'CONNOR, a U. S. Department of Agriculture Meat Inspector who regularly inspected his meat processing operations in 1975.

BERKELY stated he generally opened his market about 7:00 AM each day, and O'CONNOR usually arrived between 8:00 and 9:00 AM to perform his inspections. BERKELY stated his market's meat department is a small operation, and it generally took only 15 to 20 minutes to O'CONNOR to perform the required inspections. BERKELY stated that O'CONNOR occasionally pointed out deficiencies which he had found in his inspections, but that these conditions were always corrected promptly, and were never permitted to continue to the point where he was cited for a violation.

BERKELY stated that in his opinion, O'CONNOR's inspections were performed in a conscientious, thorough, and fair manner. BERKELY stated positively that O'CONNOR never solicited any payoffs of money, meat products, or anything else of value from him for any purpose whatsoever, and further stated that on no occasion did he ever attempt to influence O'CONNOR by offering such payoffs.

Interviewed on 3/8/77 at New Castle, Pa. File # New Rochelle 58-1821-
Pittsburgh 58-230
by SA RICHARD A. OBERLANDER/mpj *RO* Date dictated 3/9/77

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Date of transcription 3/9/77

GEORGE STEVENS identified himself as a primary stockholder in Silver Maple Foods, Inc., 121 Winter Road, New Castle, Pa. STEVENS stated he is not an officer of the company, but pays its bills and assists in the management of its operations in order to protect his investment. After examining a photograph shown to him by the interviewing Agent, STEVENS identified the individual depicted therein as being JOHN J. O'CONNOR, a U. S. Department of Agriculture Meat Inspector who was assigned to his company in 1975.

STEVENS stated that O'CONNOR required his company to install a pair of deep freezers to be in compliance with Department of Agriculture regulations, and on occasion did require them to make corrections to their equipment or in their operations. He stated, however, there were never any long-standing deficiencies which necessitated O'CONNOR to issue a citation. STEVENS characterized O'CONNOR as "a hell of a nice guy", who "never took so much as a penny, and was never given any free product". STEVENS stated that on no occasion did O'CONNOR ever solicit any payoffs in the form of money, products, or anything else of value, and further advised that such payoffs were never offered to O'CONNOR by any member of the company to influence his actions in any way.

Interviewed on 3/8/77 at New Castle, Pa. File # New Rochelle 58-1821-747
Pittsburgh 58-230
 by SA RICHARD A. OBERLANDER/mpj Date dictated 3/9/77

Date of transcription 3/9/77

MARTIN WALDMAN, President of Waldman's Meats, Inc., 809 Sampson Street, New Castle, Pa., examined a photograph shown to him by the interviewing Agent, and identified the person shown therein as being JOHN J. O'CONNOR, a U. S. Department of Agriculture Meat Inspector who examined his operations on a regular basis in 1975. WALDMAN stated that he has more contact with the Meat Inspectors than anyone else in his firm, and that he is aware of everything that occurs at his company as pertains to inspection operations.

WALDMAN stated that he is aware that O'CONNOR was transferred to the New Castle, Pa., area, after having served as an Inspector in New York. He stated O'CONNOR would generally arrive on the company's premises early in the morning, remain $\frac{1}{2}$ to 1 hour, then drop in unexpectedly several times during the day. He stated O'CONNOR inspected all aspects of the company's meat processing operations, and in his opinion, was very knowledgeable of the meat business. He stated that O'CONNOR required him to install a second ceiling in the building to prevent debris from falling into the product and, in general, was very tough on the firm. He stated that O'CONNOR did, occasionally, tag or condemn products which he felt merited such action.

WALDMAN stated positively that O'CONNOR never solicited money, meat products, or anything else of value from himself or any member of the firm for any reason whatsoever, and further stated that on no occasion did he ever attempt to influence O'CONNOR in any manner by offering him such payoffs.

Interviewed on 3/8/77 at New Castle, Pa.

New Rochelle 58-1821-746

~~Pittsburgh 52-220~~

SA RICHARD A. OBERLANDER/mpj (10-15)

3/9/77

by _____ Date dictated _____

Date of transcription 3/10/77

FRED VOGEL, a partner of the E&B Provisioning Company, 230 Mead Street, Millvale District, Pittsburgh, Pennsylvania, examined a photograph of U.S. Department of Agriculture Meat Inspector JOHN J. O'CONNOR, who was assigned to that facility from April to July, 1973. After examining this photograph, VOGEL stated he neither recognizes nor remembers O'CONNOR, but can nevertheless positively state that he has never been solicited for a payoff of money, meat products, or anything else of value, by any U.S. Department of Agriculture Meat Inspector. VOGEL stated his operation is too small to sustain violations of the type that would give rise to payoff situations. He further advised he would not stand for such conduct on the part of any Inspector assigned to his facility.

Interviewed on 3/9/77 at Pittsburgh, Pa. File # New Rochelle 58-1821-74
Pittsburgh 58-230
by SA RICHARD A. OBERLANDER:mks Date dictated 3/10/77

Date of transcription

3/10/77

LOUIS TRONZO, Owner of Tronzo Sausage, 3326 Babcock Boulevard, Pittsburgh, Pennsylvania, telephone number 364-8030, examined a photograph shown to him by the interviewing Agent depicting U.S. Department of Agriculture Meat Inspector JOHN J. O'CONNOR, who was assigned to the Tronzo Sausage facility from April to July, 1973. After viewing this photograph, Mr. TRONZO stated he neither recognizes nor remembers Mr. O'CONNOR as a Meat Inspector at his facility. TRONZO stated that despite his inability to positively remember O'CONNOR, he nevertheless can positively state that he has never been solicited for a payoff of money, meat products, or anything else of value by any Meat Inspector who was ever assigned to his facility. He further stated that his operation is so small that he has never encountered any difficulty in passing inspections, and accordingly, believes that Meat Inspectors have never been in a position to do anything for him.

Interviewed on 3/9/77 at Pittsburgh, Pa. File # New Rochelle 58-1821-74
Pittsburgh 58-230
by SA RICHARD A. OBERLANDER:mks Date dictated 3/10/77

BERNARD SPOWAL, Owner of Paul and Ann's Restaurant, Route 8, Valencia, Pennsylvania, 16059, telephonically advised that he owned the Tem-Tee Steak Company, 2406 Dagenhart Road, Gibsonia, Pa., during the period April to July, 1973, when U.S. Department of Agriculture Meat Inspector JOHN J. O'CONNOR was assigned to that facility. SPOWAL stated he vaguely recalls O'CONNOR as an individual who did not appear to be overly interested in his job, and who spent very little time performing inspections of his facility. SPOWAL stated that generally, he had very good luck with the U.S. Department of Agriculture Inspectors assigned to his facility, and stated that none of them, including O'CONNOR, ever attempted to solicit a payoff in the form of money, meat products, or anything else of value.

SPOWAL noted that in December, 1973, he sold the Tem-Tee Steak Company to its current owner, EDDIE PASEWICZ.

New Rochelle 58-1821

3/10/77

Pittsburgh, Pa.

Pittsburgh 58-230

Interviewed on _____ at _____ File # _____

SA RICHARD A. OBERLANDER:mks

3/10/77

by _____ Date dictated _____

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 3/11/77

WILLIAM CHAZEN was contacted at his place of business, Willo Packing Company, Incorporated, 114 North 6th Street, Brooklyn, New York, and displayed photographs of the following United States Department of Agriculture Meat Inspectors:

DAVID ROSEN
CARL BENEDETTO
KURT JACOBS
STEVEN STAVRIDES
JOSEPH BOPP
BARRY RESNICK
ROBERT GUBELMAN
VINCENT COCA
JOHN O'CONNOR
GEORGE MORABITO
ANTONIO RANNAZISSI
HAROLD BERG
MICHAEL MARINO
EDWARD LEONELLI
CARL BOCCHICHIO
JAMES ALLEN

CHAZEN advised that he recognized photograph number 42 (DAVE ROSEN) as a supervisor who used to come to his plant once in a while but he (CHAZEN) never gave him anything. CHAZEN did not recognize the photograph (86) of JOHN O'CONNOR nor did he recognize the name JOHN O'CONNOR.

Interviewed on 3/9/77 at Brooklyn, NY File # NR 58-1821
by SA RICHARD C. GENTILCORE/ap Date dictated 3/9/77

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3/9/77

Willie Packman

William Chayer 414 N. 6th St.

36-

Knows G. M.

42-

Supervisor - never gave
camera on occasion - didn't

86-

didn't recognize as
being in plantDid not know name
O'Connell

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 3/11/77

JEFFREY RUBIN was contacted at his place of business, Jacob Zucker, 178 South Elliot, Brooklyn, New York and displayed photographs of the following United States Department of Agriculture Meat Inspectors:

DAVID ROSEN
CARL BENEDETTO
KURT JACOBS
STEVEN STAVRIDES
JOSEPH BOPP
BARRY RESNICK
ROBERT GUBELMAN
VINCENT COCA
JOHN O'CONNOR
GEORGE MORABITO
ANTONIO RANNAZISSI
HAROLD BERG
MICHAEL MARINO
EDWARD LEONELLI
CARL BOCCHICHIO
JAMES ALLEN

RUBIN knew DAVID ROSEN by name and photograph and said he had never given him anything.

RUBIN did not know O'CONNOR by name or photograph.

Interviewed on 3/7/77 at Brooklyn, NY File # NR 58-1821
by SAS RICHARD C. GENTILCORE and
MARTIN J. ADELMAN/RCG/ap 3/8/77
by _____ Date dictated _____

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Zucker Jeffrey Kuber 3/7

47 - Rosen - No

36 - Morabito

22 - Stawides - testified

86 - O'Connor - No by name or photo

Date of transcription 3/23/77

MICHAEL CONWAY, Regal Chef, 98 North 3rd Street, Brooklyn, New York was interviewed regarding payoffs to the United States Department of Agriculture (USDA) meat inspectors. CONWAY was read alphabetically the names of 16 USDA meat inspectors indicted on November 9, 1976 by a Federal Grand Jury in the Southern District of New York for alleged violations of Title 21, Section 622, United States Code. He was also displayed photographs of these inspectors. CONWAY recognized CARL BOCCHICCHIO by name and photograph (72) but said this inspector had been at his plant on an irregular basis for only a few days at a time. CONWAY never gave anything to BOCCHICCHIO.

Interviewed on 3/23/77 at Brooklyn, New York File # 58-1821-769
by SA RICHARD C. GENTILCORE/ap Date dictated 3/29/77

Regal Chef Mike Conway 3/23

C. B. here

~~Tom O'Connor~~ here

Tom O'Connor here - temporary
gave him volunary

C. B. by name + photo
not on regular basis —
only few days at time

FEDERAL BUREAU OF INVESTIGATION

3/11/77

Date of transcription

ANTHONY BORRIELLO was contacted at his place of business, Jacob Zucker, 178 South Elliot, Brooklyn, New York and displayed photographs of the following United States Department of Agriculture Meat Inspectors:

DAVID ROSEN
CARL BENEDETTO
KURT JACOBS
STEVEN STAVRIDES
JOSEPH BOPP
BARRY RESNICK
ROBERT GUBELMAN
VINCENT COCA
JOHN O'CONNOR
GEORGE MORABITO
ANTONIO RANNAZISSI
HAROLD BERG
MICHAEL MARINO
EDWARD LEONELLI
CARL BOCCHICHIO
JAMES ALLEN

BORRIELLO did not recognize the photograph of JOHN O'CONNOR and when O'CONNOR's name was mentioned to him by SA GENTILCORE, BORRIELLO said he was not sure of the name.

Interviewed on 3/7/77 at Brooklyn, NY File # NR 58-1821
by SAS RICHARD C. GENTILCORE and
MARTIN J. ADELMAN /RCG/ap Date dictated 3/8/77

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3/7

Ant. Barnello

- 36 - Morabito - remembers ?
42 - Rosen - ~~holding~~
22 - Slavides - yes

O'Connor - Not sure
of name & didn't recognize
photo

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 3/11/77

MARTIN WEINER was contacted at his place of business, Atlantic Veal Corporation, 172 Fort Green Place, Brooklyn, New York and displayed photographs of the following United States Department of Agriculture Meat Inspectors:

DAVID ROSEN
CARL BENEDETTO
KURT JACOBS
STEVEN STAVRIDES
JOSEPH BOPP
BARRY RESNICK
ROBERT GUBELMAN
VINCENT COCA
JOHN O'CONNOR
GEORGE MORABITO
ANTONIO RANNAZISSI
HAROLD BERG
MICHAEL MARINO
EDWARD LEONELLI
CARL BOCCHICHIO
JAMES ALLEN

WEINER advised that he never gave anything to these inspectors except for DAVID ROSEN to whom he had given money once or twice about three years ago.

WEINER stated that #86's (O'CONNOR's) face looked familiar but he did not recognize his name.

Interviewed on 3/7/77 at Brooklyn, NY File # NR 58-1821
by SAS RICHARD C. GENTILCORE and MARTIN J. ADELMAN/ RCG/ap Date dictated 3/8/77

Martin Werner 3/7

Mark Veal

O'Connor - face looks familiar
Never gave any of these guys
anything except for Rosen
Rosen - gave - once or twice
maybe 3 years ago - told Dawson this

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 3/11/77

JACK PEERLESS was contacted at his place of business, Atlantic Veal Corporation, 172 Fort Greene Place, Brooklyn, New York and displayed photographs of the following United States Department of Agriculture Meat Inspectors:

DAVID ROSEN
CARL BENEDETTO
KURT JACOBS
STEVEN STAVRIDES
JOSEPH BOPP
BARRY RESNICK
ROBERT GUBELMAN
VINCENT COCA
JOHN O'CONNOR
GEORGE MORABITO
ANTONIO RANNAZISSI
HAROLD BERG
MICHAEL MARINO
EDWARD LEONELLI
CARL BOCCHICHIO
JAMES ALLEN

PEERLESS did not recognize Inspector O'CONNOR by name or photograph.

Interviewed on 3/7/77 at Brooklyn, NY File # NR 58-1321
by SAS RICHARD C. GENTILCORE and
MARTIN J. ADELMAN/RCG/ap Date dictated 3/8/77

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Jack Kerless 3/7 Atlantic
~~Potomac~~ Deal
22- next door
42- supervisor

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 3/11/77

HARRY BUXBAUM was contacted at his place of business, Alex Stein Company, 178 Fort Green Place, Brooklyn, New York, and displayed photographs of the following United States Department of Agriculture Meat Inspectors:

DAVID ROSEN
CARL BENEDETTO
KURT JACOBS
STEVEN STAVRIDES
JOSEPH BOPP
BARRY RESNICK
ROBERT GUBELMAN
VINCENT COCA
JOHN O'CONNOR
GEORGE MORABITO
ANTONIO RANNAZISSI
HAROLD BERG
MICHAEL MARINO
EDWARD LEONELLI
CARL BOCCHICHIO
JAMES ALLEN

In going through the photographs BUXBAUM advised he had given DAVID ROSEN, who he knew by photograph and name, \$50.00 per month. He gave this money to ROSEN up until about a couple of years ago "when the case broke". He did not recall when he had started to give ROSEN money.

BUXBAUM did not recognize JOHN O'CONNOR by name or photograph.

Interviewed on 3/7/77 at Brooklyn, NY File # NR 58-1821
by SAS RICHARD C. GENTILCORE and
MARTIN J. ADELMAN/RCG/ap Date dictated 3/8/77

X178 3/7/7
 Harry Bodenhauss

Seen 36 - Don't remember name
 42 - Koser - money
 ONCE a mo. - 50 - couple of
 years ago when case broke. All time
 been there. Vinnie Lora - remembers name
 Thinks he gave
 Does not recall
 O'Connor by name or photo

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 4/14/77

ANTHONY DI GIOVANNI was interviewed at his residence, 133 Cortelyu Avenue, Staten Island, New York. DI GIOVANNI was read alphabetically the names of the 16 United States Department of Agriculture (USDA) meat inspectors indicted on November 9, 1976, for alleged violations of Title 21, Section 622, United States Code. DI GIOVANNI said the names MICHAEL MARINO and JOHN O'CONNOR sounded familiar and he said DAVID ROSEN was the name of a supervisor. DI GIOVANNI was also displayed photographs of these 16 inspectors. He recognized ROSEN's photo and said photo 36 (GEORGE MORABITO) looked familiar, but he could not identify any other photo as someone who might have been at his plant, including photo 86 of JOHN O'CONNOR.

Interviewed on 4/11/77 at Staten Island, New York File # NR 58-1821-776
by SA RICHARD C. GENTILCORE/bk Date dictated 4/11/77

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4/11/77

Di Giovanni - 133 Cortez Rd
 Re: Nianh Veal + Lamb - ^{was} owner
 - Names - alphabetically

Mauve - familiar

O'Connor "

Rosen

36 - familiar

42 - Rosen

Couldn't recall O'Connor at plant

Date of transcription 3/17/77

JACK BORNSTEIN was interviewed at his residence, 540 Ocean Parkway, Brooklyn, New York, Apartment 4-F. BORNSTEIN advised he is President of Bornstein Brothers, Incorporated, formerly located at 184 South Elliot, Brooklyn, New York but is now located on West 13th Street in Manhattan. BORNSTEIN was read an alphabetical list of sixteen United States Department of Agriculture (USDA) Meat Inspectors indicted in the Southern District of New York (SDNY) on November 9, 1976 for alleged violations of Title 21, Section 622. BORNSTEIN said he knew the names COCA, RANAZISSI, MORABITO, STARRIDES, and JACOBS. BORNSTEIN thought the name JOHN O'CONNOR was familiar.

BORNSTEIN was provided with a group of photographs of these sixteen inspectors for his examination. When BORNSTEIN examined photo number 86 (O'CONNOR) he said he thought the photo was O'CONNOR's and said that he had never given him anything. He also recognized photo number 42 (ROSEN) of DAVID ROSEN and added that he had never given anything to ROSEN.

Interviewed on 3/15/77 at Brooklyn, N.Y. File # NR 58-1821 751
by SA RICHARD C. GENTILCORE/cmc *Res* Date dictated 3/17/77

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Jack Bornstein 3/15/77

540 Ocean Parkway, Brooklyn

Apt 4 F

Names alphabetically

Rosen - Never gave anything - was

supervisor. Knew names Coca Ranyissi

n, Morabito, Stavides. ^{Jacobs} ~~Rosen~~ O'Connor?

ne familiar. Never gave O'Connor

anything (thought photo⁸⁶ was O'Connor
but not sure.)



A

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 3/31/771

EDWIN SCHATTEN was interviewed at his place of business Triangle Purveyors, Incorporated, 829 East 144th Street, Bronx, New York, regarding payoffs to United States Department of Agriculture (USDA) Meat inspectors. SCHATTEN was advised that he was being interviewed as a potential witness and was not a subject of the investigation. SCHATTEN said he understood this but would rather not make any comment at this time.

SCHATTEN was served with a subpoena requiring him to appear before a Federal Grand Jury, Southern District of New York (SDNY) on April 6, 1977, to give testimony regarding alleged violations of Title 18, Sections 201 and 371 and Title 21, Section 622, United States Code.

Interviewed on 3/29/77 at Bronx, New York File # 100-53-1821

by SAS RICHARD W. BAKER and
RICHARD C. GENTILCORE/RCC/eme Date dictated 3/29/77

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3/29 w/ Baker

Edwin Schattew
Triangle Purveyors

12:45

Subpalma
no comment

v O'Connor 1
20-77

HP

COOPER

2 MR. DAMIANI: Your Honor, the defendant calls
3 Special Agent Gentilcore.

4 R I C H A R D C . G E N T I L C O R E , called as
5 a witness by the defendant, being first duly sworn,
6 testified as follows:

7 THE COURT: Mr. Gentilcore, you have been in the
8 courtroom and you have heard me speak to witnesses, and will
9 you please apply what I said to them to yourself?

10 THE WITNESS: Yes, sir.

11 THE COURT: All right. Keep your voice up, please.

12 DIRECT EXAMINATION

13 BY MR. DAMIANI:

14 Q Agent Gentilcore, will you tell us your occupation,
15 please, for the jurors?

16 A I am a special agent of the FBI.

17 Q And did there come a time during the course of
18 your duties as a special agent that you became assigned to
19 the case of John O'Connor?

20 A There was such a time.

21 Q When did you first become assigned to that case,
22 Mr. Gentilcore?

23 A It would have been about June or July of 1976.

24 Q And in what capacity did you perform your duties?

25 A Well, since the time I took over the case, in June

MP 2 Gentilcore - direct

or July of 1976, I was engaged in interviewing a number of employees and owners of meat houses. I sat in on a number of interviews conducted in the United States Attorney's office with these meat packers, and I wrote up various reports on these interviews and provided them to the United States Attorney's office as well as to the FBI office in Washington.

Q Now, that was done in the ordinary and official course of your duties as a special agent assigned to this particular case of John O'Connor; is that correct?

A. That is correct.

Q During the course of those duties, did you prepare a list of all of the establishments that were worked at by Mr. O'Connor from the year 1973 to the present date?

A. I did not prepare that list.

MR. DAMIANA: May I have this exhibit marked, your Honor?

THE COURT: Surely.

(Defendant's Exhibit O marked for identification.)

Q I show you Defendant's Exhibit O for identification and I ask you if you would look at that exhibit.

A. (Witness complies.)

Q Did you prepare that list?

A. No; I did not.

- 1 MP 3 Gentilcore - direct
- 2 Q Did you prepare any list similar to this?
- 3 A Yes; I did.
- 4 Q When was that list prepared?
- 5 A Some time in the second half of February 1977, this
- 6 year.
- 7 Q 1977?
- 8 A That's correct.
- 9 Q That was while you were assigned as case agent in
- 10 the preparation of this case for trial; is that correct?
- 11 A Yes, sir.
- 12 Q Was this something that was instituted by your own
- 13 efforts or did some other superior request you to do this?
- 14 MR. LAWLER: Objection, your Honor. These questions
- 15 are all very leading.
- 16 MR. DAMIANI: I don't believe they are.
- 17 THE COURT: I will allow it.
- 18 (To the witness:) Will you answer that question,
- 19 please, simply and directly?
- 20 A Yes, sir. It was something that I did on my own.
- 21 Q Can you tell me why you did that on your own?
- 22 A Well, in reviewing the list that you just showed
- 23 me, that exhibit, I came across a number of meat packing
- 24 houses in Brooklyn, about ten or twelve, and I knew that
- 25 these ten or twelve houses had cooperated in Brooklyn, in

1 HP 4 Gentilcore - direct

2 the Eastern District of New York, in the Government's investi-
3 gation over there. I knew that Mr. O'Connor had been assigned
4 to these houses at one time or another, or I believed at the
5 time that he had been assigned to these ten or twelve houses,
6 and I believed also at the time that none of these ten or
7 twelve houses -- none of the representatives of these ten
8 or twelve houses had ever said Mr. O'Connor had taken any
9 money from them.

10 I also know, as I said, that these houses had
11 cooperated with the Government and that they had admitted
12 making pay-offs to meet inspectors, so I thought it strange
13 that none of these houses -- at least I believed that none
14 of these houses had ever said Mr. O'Connor had ever taken
15 any money.

16 Q And you knew, did you not, in preparing that list,
17 that certain of those houses had in fact admitted that they
18 had made payments to inspectors, both in the Eastern District
19 -- in Brooklyn -- and in Manhattan?

20 MR. LAWLER: I object, your Honor. This is the
21 defendant's witness, and he continues to lead the witness.

22 THE COURT: Objection sustained.

23 Q Did you know whether or not those establishments
24 had admitted making payments to those inspectors both in
25 Brooklyn and Manhattan?

1 MP 5 Gentilcore - direct

2 A I believe I did at the time.

3 Q Did you know at that time that Mr. O'Connor was
4 not indicted in Brooklyn?

5 A Yes; I did.

6 Q And, as a result, I understand you prepared a list
7 basically of not only the Brooklyn Establishments, but in
8 your vigor and in your specialty as a prosecutor you pre-
9 pared a list of all the other establishments that he worked
10 at; is that correct?

11 MR. LAWLER: Again, your Honor, defense counsel
12 is testifying. He is not asking questions of the witness.

13 THE COURT: Yes. The objection is sustained.

14 Q Well, in the normal course of your duties, Agent
15 Gentilcore, did you prepare in addition to the list of meat
16 packing houses that Mr. O'Connor had worked at in Brooklyn,
17 a list of other places where Mr. O'Connor had worked?

18 A Yes; I did.

19 Q And did those other places include the geographical
20 area of Pennsylvania?

21 MR. LAWLER: Again, your Honor, I think Mr.
22 Damiani is leading the witness. There are many ways in
23 which that question could be asked properly.

24 THE COURT: Yes. Sustained.

25 Q Did this list include the meat packing houses in

1 HP 6 Gentilcore - direct

2 A I am sorry. I never prepared a list of houses he
3 had worked at in Pennsylvania.

4 Q Did you ever refer to a list of houses where the
5 defendant worked at in Pennsylvania?

6 A Yes; I did.

7 Q Did you request that another member of your de-
8 partment or an agent in Pennsylvania check those particular
9 establishments? Did you request it? Yes or no.

10 THE COURT: Hold it.

11 MR. LAWLER: Again, your Honor, I am going to ob-
12 ject, because defense counsel is continuing to lead the
13 witness.

14 THE COURT: Yes. Watch it, please. I will allow
15 that last question, but be careful about leading.

16 Will you read the question, please, Mr. Reporter?

17 (Question read.)

18 A Yes, sir; I did.

19 THE COURT: Next question.

20 Q And did you receive, in the normal course of your
21 duties as an agent, reports from that agent in Pennsylvania?

22 A I did.

23 Q And those reports were directed to you; is that
24 not a fact?

25 A They were directed to the FBI office in New Rochelle.

1 MP 7 Gentilcore - direct

2 and I in the course of normal business received that.

3 Q Now, with regard to the establishments that you
4 listed in Brooklyn, did you personally find it difficult to
5 believe that the defendant was not indicted in Brooklyn?

6 THE COURT: Hold it.

7 MR. LAWLER: Objection, your Honor.

8 THE COURT: Sustained.

9 (Defendant's Exhibit P marked for identification.)

10 Q I show you Defendant's Exhibit P for identification,
11 and I will ask you: is that the list that was prepared by
12 you, Mr. Gentilcore?

13 A It is.

14 Q And that was prepared by you in the ordinary
15 course of your duties as an agent assigned to this case?

16 A Yes.

17 MR. DAMIANI: I will offer that in evidence, your
18 Honor.

19 THE COURT: Show it to Mr. Lawler, please.

20 (Pause.)

21 MR. LAWLER: The Government objects to this as
22 irrelevant, your Honor.

23 THE COURT: May I see it, Mr. Clerk? Give it to
24 the clerk.

25 (Pause.)

1 MP 8 Gentilcore - direct

2 THE COURT: Objection overruled. I will let it
3 go in.

4 (Defendant's Exhibit P for identification was
5 received in evidence.)

6 THE COURT: Next question, please.

7 Q Agent Gentilcore, did you then conduct personal
8 interviews of various representatives of those companies in
9 Brooklyn where Mr. O'Connor was employed?

10 MR. LAWLER: Objection, your Honor. It is leading
11 the witness again.

12 THE COURT: I do not agree with you there. That
13 is the least he can do in order to give sense to the question.

14 The objection is overruled.

15 A I did.

16 THE COURT: Next question.

17 Q And during the course of those interviews, did you
18 take notes?

19 A I did.

20 Q And after making those notes, did you prepare what
21 is known as a 302 form?

22 A I did.

23 Q Will you describe to this jury, please, what a
24 302 form is?

25 A A 302 form is a typewritten sheet of paper that

1 AP 9 Gentilcore - direct

2 basically contains the substance of any interview that an
3 FBI agent conducts.

4 Q And it is usual and normal for an agent to do this?
5 It is proper procedure, is it not?

6 A. That's affirmative.

7 THE COURT: Please say yes or no.

8 THE WITNESS: Yes, sir.

9 THE COURT: I don't want this "affirmative" or
10 anything else like that. Please say yes or no. That makes
11 us very certain as to what you are saying.

12 Next question.

13 Q Did you have occasion to receive from the agent
14 in Pennsylvania 302 reports?

15 A. I did.

16 Q And did those 302 reports concern the business
17 establishment that were worked at by the defendant? Is
18 that correct?

19 MR. LAWLER: Objection, your Honor, again. He
20 could ask what those reports contained.

21 THE COURT: Yes. Please avoid leading, counsel.

22 The objection is sustained.

23 Q Were the reports that you had received from the
24 agent in Pennsylvania received in the normal course of your
25 duties as an agent assigned to this case?

§§§

1 MP 10 Gentilcore - direct

2 A. They were.

3 Q And did you personally, Mr. Gentilcore, interview
4 witnesses at Willow Packing Company, where the defendant
5 worked?

6 A. I did.

7 THE COURT: Where is that? Is that in Pennsylvania?

8 MR. DAMIANI: No, your Honor. In Brooklyn, New
9 York.

10 THE COURT: Is that right, Mr. Gentilcore?

11 THE WITNESS: Yes, sir.

12 THE COURT: Well, we didn't know that. The jury
13 didn't know that.

14 Next question.

15 Q Do you recall whom you interviewed at Willow
16 Packing Company?

17 A. No; I do not.

18 Q Does the name William Chazen refresh your recollec-
19 tion?

20 A. Yes. That's the man I interviewed.

21 Q And did you interview Jeffrey Rubin at Jacob
22 Zucker, in Brooklyn?

23 A. Yes.

24 Q And you determined that Mr. O'Connor had worked
25 there?

- 1 MP 11 Gentilcore - direct
- 2 A. Yes; I did.
- 3 Q. And a Mr. Michael Conway at Regal Chef, North 3rd
- 4 Street, in Brooklyn?
- 5 A. Yes; that is correct.
- 6 Q. And Mr. Anthony Borrello of Jacob Zucker, in
- 7 Brooklyn?
- 8 A. Yes, sir; that's correct.
- 9 Q. A Mr. Martin Weiner of Atlantic Veal Corporation?
- 10 A. Yes, sir.
- 11 Q. Atlantic Veal was another name that was on the
- 12 list that you had prepared; is that correct?
- 13 A. That is correct.
- 14 Q. And Jack Peerless of Atlantic Veal?
- 15 A. That is correct.
- 16 Q. Harry Buxbaum of Allen Stein Company, in Brooklyn?
- 17 A. Yes, sir.
- 18 Q. And a Mr. Anthony DiGiovanni?
- 19 A. Yes, sir. I interviewed him.
- 20 Q. Do you recall for whom he worked at the time?
- 21 A. I'm not certain.
- 22 Q. Would the name Manhattan Veal & Lamb refresh your
- 23 recollection?
- 24 A. Yes.
- 25 Q. And Mr. Jack Bornstein of Bornstein Brothers, in

1 MP 12 Gentilcore - direct

2 Brooklyn?

3 A Yes; I spoke to him.

4 Q Mr. Edwin Schatten of Triangle Purveyors?

5 A Yes; I spoke to him.

6 Q The names that I have just read to you of these
7 meat packing plants were included on Defendant's Exhibit O
8 for identification, were they not?

9 A They were.

10 Q And there are other establishments included on that
11 exhibit also, are there not?

12 A There are.

13 Q And was it your intention to go through each and
14 every one of these establishments?

15 A No.

16 Q Which ones were you determined to go to, Mr.
17 Gentilcore?

18 A The ones in Brooklyn that had cooperated with the
19 Government in the Eastern District, in Brooklyn.

20 Q Well, are there any names that I have mentioned
21 thus far of corporations where you had occasion to inter-
22 view a representative who had not cooperated with the
23 Government in the Eastern District?

24 A Yes; there was one such establishment.

25 Q Which establishment was that?

1 HP 13 Gentilecore - direct

2 A. Triangle.

3 Q And did I read that particular name before:
4 Triangle?

5 A. You did.

6 Q How about Zion Kosher?

7 A. I never went there.

8 Q What was the purpose of your interviews with these
9 people?

10 A. To show them photographs of the sixteen meat in-
11 spectors who had been indicted in the Southern District of
12 New York back in November, November 9, 1976, for allegedly
13 taking pay-offs and to see if they could remember anything
14 about -- I told them that I wanted to talk to them to see
15 if they could remember anything about these people in the
16 sixteen photographs.

17 Q Now, you showed them, as I understand, sixteen
18 photographs.

19 A. Yes.

20 Q That was the complete number of the people who
21 were indicted in the Southern District?

22 A. In the Southern District.

23 Q Did you show them photographs of all the people
24 who were indicted?

25 A. In the Southern District.

1 MP 14 Gentilecore - direct

2 THE COURT: The jury should not be left in the
3 dark as to what you mean. Won't you say "Manhattan" instead
4 of "Southern District"? We know what it is, but they don't.

5 Next question.

6 Q Did you receive, in the regular course of your
7 duties 302 reports that were from the agents who visited in
8 Pennsylvania?

9 A Yes; I did.

10 Q And did those 302 reports refer back to the various
11 times when Mr. O'Connor worked in Pennsylvania?

12 A I don't remember.

13 MR. DAMIANI: Will you mark this for identifica-
14 tion, please.

15 (Defendant's Exhibit Q marked for identification.)

16 Q Will you look at the last three pages of Defend-
17 ant's Exhibit Q for identification.

18 A (Witness complies.)

19 Q Having reviewed that Exhibit Q for identification,
20 does that refresh your recollection as to any of the 302
21 forms, or the summary forms, which were submitted by the
22 agent in Pennsylvania which concerned themselves with the
23 period of time in 1973 when Mr. O'Connor worked there?

24 A It does. I remember now.

25 MR. DAMIANI: Will you mark this for identifica-

1 MP 15 Gentilcore - direct

2 tion, please.

3 (Defendant's Exhibit R marked for identification.)

4 Q I show you Defendant's Exhibit R for identification,
5 Mr. Gentilcore, and ask you whether or not you can identify
6 that exhibit.

7 A I can identify it.

8 THE COURT: The answer is yes?

9 THE WITNESS: Yes, sir.

10 THE COURT: Please resort to that, if you can. It
11 is less expensive.

12 Q Does that contain your original notes of the
13 interviews held with the people I have just referred to in
14 Brooklyn and Manhattan?

15 A Yes, sir.

16 Q And does it also include your summary of your
17 original notes which were prepared at a later date or sub-
18 sequent to the date you took your original notes?

19 MR. LAWLER: Your Honor, I would ask that the
20 witness be asked direct questions and not be continually led.
21 There is no need for it.

22 THE COURT: I am afraid I am going to have to
23 sustain the Government's objection.

24 Q What does the typed portion of Defendant's Exhibit
25 R represent to you, Mr. Gentilcore?

1 MP 16 Gentilcore - direct

2 A. This is called a Form 302. It represents the
3 substance of the interview I conducted in Brooklyn, in each
4 case.

5 Q. When is that prepared?

6 A. It's prepared within five days -- it has to be
7 prepared within five days of the interview, within five
8 working days of the interview.

9 Q. So your original notes would more adequately re-
10 flect the exact interview. This is a pick-up on the inter-
11 view, is it not?

12 MR. LAWLER: Objection, your Honor.

13 THE COURT: Overruled.

14 (To the witness:) Is this from your original
15 notes?

16 THE WITNESS: Yes; it is.

17 Q. And both these documents, Exhibits @ and R for
18 identification, were kept in the regular course of your
19 duties; is that correct?

20 A. That's correct.

21 MR. DAMIANI: I would offer in evidence, your
22 Honor.

23 THE COURT: Show them to Mr. Lawler.

24 (Pause.)

25 MR. LAWLER: The Government has no objection

1 MP 17 Gentilcore - direct

2 except as to relevance, your Honor.

3 THE COURT: What is your position?

4 MR. LAWLER: The Government would object on
5 grounds of relevance.

6 THE COURT: Do you want to come up to the side
7 bar, or do you want to argue right now? I don't know what
8 you are going to say.

9 MR. LAWLER: I would prefer to do it at the side
10 bar, your Honor.

11 THE COURT: Very well. Come up.

12 (At the side bar:)

13 MR. LAWLER: The Government takes the position
14 and will continue to take the position that the fact that
15 the defendant did not take money from one establishment is
16 not proof of the fact that he did not take money from the
17 establishments in question, and that would be the only
18 relevance that the Government perceives in these exhibits,
19 R. and Q, which are being offered in evidence, and on that
20 ground the Government will object.

21 THE COURT: All right. What do you say?

22 MR. DAMIANI: I say, your Honor, that these are
23 relevant to the issues that have been brought to this forum
24 by virtue of the prosecution's presentation of similar act
25 testimony.

1 MP 18 Gentilcore - direct

2 I would submit that the Court has already instructed
3 the jury that the similar act testimony pertained to the
4 intent of the defendant, the plan of the defendant, and I
5 respectfully submit that I am trying to save time by bringing
6 in the 302's, which are the summary reports of the witnesses,
7 rather than having to bring in each witness.

8 THE COURT: Yes, but suppose you want the Court
9 and jury to conclude that when this witness made inquiry
10 of various places he found no evidence against the defendant.
11 Is that admissible? Is that what you say is admissible?

12 MR. DAMIANI: I would say the jury should have the
13 right to consider it, your Honor.

14 THE COURT: All right. The Government's position
15 is sustained to the extent that we will not allow Exhibits
16 Q and R for identification to come into evidence at this
17 time, but you may renew your offer at a later time. They
18 cannot now be received, even though they were to show what
19 you say they show. I do not see that it is admissible at
20 all. Those of us who have investigated know that you may
21 spend weeks and months and years and find that you have gone
22 on a trail that gets you nowhere, and you suddenly come onto
23 another angle, and there you hit what we commonly refer to
24 as pay dirt.

25 Do you mean to say that every time you go into a

1 MP 19 Gentilcore - direct

2 single investigation you are allowed to put in evidence of
3 every step that you took in connection with that investiga-
4 tion?

5 MR. DAMIANI: It is not investigation of every
6 case, your Honor. It involves the similar act testimony, and
7 I respectfully submit that this jury has a right to consider
8 the obtaining of no money from organizations that admitted
9 paying other inspectors.

10 I respectfully submit that they are admissible as
11 a general exception to the hearsay rule, as records kept by
12 the FBI agent in the regular course of his duties.

13 THE COURT: If they were relevant; but I agree
14 that they are not relevant.

15 MR. DAMIANI: Your Honor, the rules define rele-
16 vancy --

17 THE COURT: I do not want to be instructed on the
18 definition of relevancy. I know you are disappointed. I
19 know you planned to introduce these, and I have let you make
20 your record so that your position would be protected.

21 All I have said is that I do not think there is
22 any basis for going into this at this time or introducing
23 these exhibits at this time. If something develops that would
24 change my mind, I will reconsider my ruling.

25 MR. DAMIANI: Perhaps your Honor might advise me

1 MP 20 Gentilcore - direct

2 as to what you think would be the proper subject to come
3 up from this witness.

4 THE COURT: I can't do that. You have to run it
5 as you see best. You are doing splendidly. I know you are
6 disappointed, but I have to make rulings applicable to the
7 issues as each issue is created.

8 Go on with your questioning and see if you can get
9 further than you have. You have asked a lot of questions
10 dealing with where he worked and what inquiries he conducted
11 and so forth. I don't see how that makes it relevant, but
12 go ahead, and we will rule on each question.

13 MR. DAMIANI: Exception.

14 THE COURT: Yes.

15 (In open court:)

16 BY MR. DAMIANI: (Continuing)

17 Q Mr. Gentilcore -- or Agent Gentilcore, did Mr.
18 William Chazen of Willow Packing Company, Inc. indicate to
19 you that he made payments to Mr. O'Connor in money, meat or
20 any other manner?

21 MR. LAWLER: Objection, your Honor. The question
22 is leading.

23 THE COURT: Sustained.

24 Q Did Jeffrey Rubin of Jacob Zucker indicate that he
25 made payments to Mr. O'Connor in meat or money or any other

1 MP 21 Gentilcore - direct

2 form?

3 MR. LAWLER: Objection, your Honor. I will ask
4 that defense counsel not be allowed to continue this form
5 of questioning.

6 THE COURT: If you do, I shall tell the jury what
7 the ruling is. Make up your mind. You may not like the
8 Court's ruling, but you must not ask those questions. If you
9 continue, I will have to explain to the jury why I am ruling
10 in this manner.

11 MR. DAHIANI: I would prefer that you do.

12 THE COURT: Counsel is trying to get in evidence
13 through this witness with respect to investigations conducted
14 over a period of time. The law says that just because some
15 people say, "I didn't give the defendant any money," that
16 does not mean that the defendant did not take money from
17 another source.

18 In the same manner, when the jury concludes that a
19 defendant has violated the law with respect to one charge of
20 an indictment, the jury is not entitled to infer that he
21 violated the law with respect to other counts of the indict-
22 ment.

23 That evidence is inadmissible because it estab-
24 lishes nothing pro and con with respect to the items sub-
25 mitted to the jury. Counsel has an exception to the ruling

1 ER 22 Gentilcore - direct

2 out of that line of inquiry.

3 MR. DAMIANI: Thank you, your Honor.

4 Your Honor's ruling, I assume, also concerns
5 Defendant's Exhibit Q, pertaining to the 302 reports?

6 THE COURT: I have already told you that. I
7 have ruled right at the side bar, on the record. You know
8 that as well as I do. I told you if you did anything else
9 or brought out anything else along that line you would have
10 the right to renew the offer. I stand on the ruling.

11 BY MR. DAMIANI: (Continuing)

12 Q Was this investigation done in the ordinary course
13 of your duties as an FBI agent in preparing this case for
14 trial?

15 A. It was.

16 Q Did you feel it necessary to do so in this case?

17 MR. LAWLER: Objection, your Honor, to the form of
18 the question.

19 THE COURT: I will let him answer.

20 (To the witness:) Did you do that?

21 THE WITNESS: Yes, sir.

22 THE COURT: You were out to look for data relating
23 to the activities as an inspector of this defendant; is that
24 it?

25 THE WITNESS: Yes, sir.

1 NP 23 Gentilcore - direct

2 THE COURT: And you went to the various sources
3 in order to determine whether there was anything contrary to
4 law? Is that what you are telling us?

5 THE WITNESS: Yes, sir.

6 THE COURT: And during the course of that, you
7 interviewed a lot of people; is that so?

8 THE WITNESS: Yes; I did.

9 THE COURT: You have indicated that by your
10 testimony.

11 Very well.

12 Q And was it in that same inquiry wherein these
13 notes and 302's were prepared that you had occasion to inter-
14 view Mr. Salvatore Cucurullo and Mr. Steven Korn?

15 A Yes.

16 Q And was it in this same interview that you had
17 occasion to interview Arthur Vorchheimer?

18 A Yes, sir.

19 Q And were they all part of the same investigation?

20 A Yes, sir.

21 Q And all of these reports were kept in the regular
22 course of your duties?

23 A Yes, sir.

24 Q All of these reports were consistent with the
25 investigations that you were making in this case; is that

1 HP 24 Gentilcore - direct/cross
2 correct?

3 A Yes, sir.

4 MR. DAMIANI: I would ask that they be received
5 under the business record rule.

6 THE COURT: What are "they"?

7 MR. DAMIANI: Q and R, as part of the total re-
8 ports, your Honor.

9 MR. LAWLER: Same objection, your Honor. There
10 may be relevant reports, and the Government would not have
11 any objection to those, but the total package has to be
12 objected to, and I would continue to object.

13 THE COURT: Yes; the objection is sustained.

14 MR. DAMIANI: I have no further questions, your
15 Honor.

16 THE COURT: Cross-examination.

17 CROSS-EXAMINATION

18 BY MR. LAWLER:

19 Q In Defendant's Exhibit O --

20 MR. LAWLER: Is O in evidence?

21 MR. DAMIANI: No; it is not. I will consent to
22 it going in.

23 Q In Defendant's Exhibit P, that is a list of meat
24 packing houses in Brooklyn that you spoke with?

25 A Yes; that's correct.

1 MP 25 Gentilcore - cross

2 THE COURT: Just say "Yes", will you please, Mr.
3 Witness, if it is so.

4 Q And in many of these houses, is it not a fact that
5 the owners and employees of those houses could not identify
6 Mr. O'Connor as ever having worked there? Is that correct?

7 A Yes.

8 Q You showed them the photograph of Mr. O'Connor,
9 and they could not identify him?

10 A Yes.

11 Q Did you also find in your investigation that for
12 many of these houses Mr. O'Connor had only worked there a
13 short time, for a matter of days or maybe a week or two?

14 A I can only recall at least one.

15 Q And did you also find in the course of your investi-
16 gation in Brooklyn that the employees of at least three of
17 the houses said that they did recognize Mr. O'Connor and
18 that in fact they had paid Mr. O'Connor?

19 A Yes.

20 THE COURT: The Court instructs the jury that that
21 is not to be considered by you at all as an established
22 fact. You were not there; I was not there. We don't know
23 what may have motivated these people to say what they said,
24 whether it was right or truthful or not. We only know what
25 has been sworn before us, and I will entertain a motion to

1 MP 26 Gentilcore - cross

2 strike it.

3 MR. DAMIANI: I so move, your Honor.

4 THE COURT: Yes. It is stricken, and the jury will
5 disregard it.

6 MR. DAMIANI: I have a motion to make at the side
7 bar, your Honor.

8 THE COURT: Very well. Come up.

9 (At the side bar:)

10 MR. DAMIANI: Your Honor, I respectfully move for
11 the withdrawal of a juror at this time. The prosecution has
12 referred to three similar acts at this stage, indicating three
13 similar acts with regard to people identifying the defendant.
14 The prosecution has indicated in its similar act presenta-
15 tion that there were involved Arthur Vorchheimer and Mr.
16 Korn and Mr. Darien and Mr. Myron Bernstein from Omaha
17 Supply.

18 The prosecution chose not to call Mr. Bernstein
19 and Mr. Darien, and the prosecution has referred in cross-
20 examination to three similar acts.

21 I respectfully move for the withdrawal of a juror.

22 MR. LAWLER: Your Honor, the defendant chose to
23 put on Mr. Gentilcore. The defendant chose to question him
24 about the investigation that he conducted. The defendant
25 chose to question him about what the investigation adduced

1 MP 27 Gentilcore - cross

2 and what he did, and the Government believes it is its right
3 solely following up on the door that was opened, wide open,
4 by defense counsel in calling Mr. Gentilcore to the stand
5 and asking him the questions that he did, your Honor.

6 THE COURT: Yes, but you foreclosed defense counsel
7 by your own objection from developing the affirmative of
8 what he wanted to show. We sustained your objection. Then
9 what did you do? You rushed in and you showed what the
10 inquiry did establish that is in favor of the Government.
11 I don't think you had any right to, otherwise I would not
12 have made the comment to the jury that I did, nor would I
13 have gone as far as I did by inviting the motion to strike.
14 I would have stricken it myself.

15 That is exactly the type of thing that must be
16 avoided, because it is not established, factual material
17 that can be of any value, and it must not be heard by the
18 jury. It is only your getting in three names, so that if I
19 had not said something to them, they would have said, "Well,
20 there are three more people who said they paid."

21 That was not established by proof as to these ad-
22 ditional things. Whether it rises to the point where a mis-
23 trial must be declared is something we ought to consider.
24 My inclination is to say no to it, but we will talk further.

25 I think I will excuse the jury, so we can go into

1 MP 20

2 it further, or you may have some authority that you may feel
3 supports your position. You don't have to agree with the
4 Judge. You can be as firm your way as I feel I am when I
5 have to make a ruling.

6 All right. What do you think of that? Don't you
7 think we might be better advised to do it that way?

8 MR. LAWLER: Your Honor, with the defendant's
9 exception I can perhaps finish my cross-examination of Mr.
10 Gentilecore, avoiding the area that we just talked about,
11 and depending upon what your Honor rules, there may be no
12 necessity --

13 THE COURT: Well, if there is a mistrial ordered,
14 it will be despite the completion of your testimony. It is
15 going to be addressed to the motion that is pending; so
16 will let you complete your cross-examination.

17 MR. DASHMAN: I respectfully except.

18 (In open court:)

19 THE COURT: Just by way of amplification, although
20 I don't think it is necessary, I want you to know that what
21 is said outside of the courtroom is generally what we call
22 hearsay. It is not generally admissible. It has no meaning.
23 What motivates people to say what they do can be explained
24 in a hundred different ways, and so that is the reason the
25 law says, "None of that. We won't be bothered with any"

1 MP 29

2 chat."

3 We don't know the truth of that. We only know what
4 is testified to before a jury. I want to drive that home.
5 Now, so it will be absolutely clear and you understand it,
6 I want you to disregard what you have been told to disregard,
7 and I want to be sure you understand it.

8 Ha Forelady, did you understand me?

9 THE FORELADY: I think if you would repeat just
10 your last statement --

11 THE COURT: Well, I was amplifying what I said
12 before and that is that the jury was to disregard the ques-
13 tion that was put to this witness by the prosecutor when
14 he was asking him, "When you went around investigating,
15 weren't there three people who paid the defendant, or said
16 they paid the defendant?" That you have to disregard, and I
17 am explaining to you why, because it was a statement that was
18 made outside of the court and that the only thing you can
19 consider is that which is said before you in the court. That
20 was not proven, those three episodes.

21 The testimony that you have listened to relates
22 to the charges before you. You heard testimony with regard
23 to Count 1, Count 2 and everything that is in the indictment.
24 You were given names of places. We don't even know the
25 names of these three people that were being referred to.

1 HP 30

2 Do you understand?

3 THE FORELADY: Yes.

4 THE COURT: And, therefore, the jury has to dis-
5 regard that. It does not count, as though it had not ever
6 been uttered.

7 Is that clear to you, Madam Forelady?

8 THE FORELADY: Yes.

9 THE COURT: Do you understand the explanation?
10 Do you understand that the proof is not before you at all?
11 The only way you establish that is in a court of law, with
12 the jury listening and facts brought out. Is that clear?

13 THE FORELADY: Yes.

14 THE COURT: Thank you.

15 Is it clear to you?

16 JUROR NO. 2: Yes; it is.

THE COURT: And you? Is it crystal clear to you?

18 JUROR NO. 3: Yes.

19 THE COURT: And can you disregard the question that
20 was put

21 JUROR NO. 3: Yes.

22 THE COURT: And you tell me and you assure me under
23 your oath that that in no way prejudices you?

24 JUROR NO. 3: Yes.

25 THE COURT: And you will pay no attention to it.

1 MP 31

2 Is that clear to you?

3 JUROR NO. 4: Yes.

4 THE COURT: And you, sir?

5 JUROR: No. 5: Yes, sir.

6 THE COURT: When you say yes, you will disregard
7 that particular item, the question that was put?

8 JUROR NO. 6: Yes.

9 THE COURT: And may I ask you --

10 JUROR NO. 7: I will disregard what was said in
11 the previous question.

12 THE COURT: Very well. And you --

13 JUROR NO. 8: I will disregard it.

14 THE COURT: And is it clear to you?

15 JUROR NO. 9: I will disregard that, but I have
16 a little bit of difficulty.

17 THE COURT: No. don't say anything other than
18 what I am asking you. I don't want you to tell me about a
19 difficulty that may cause us a mistrial here. Just address
20 yourself to what the Judge is asking. This happened, and I
21 am trying to find out whether there is any prejudice or
22 whether the jury can disregard what was brought out by that
23 question.

24 I want your answer to that.

25 JUROR NO. 9: I can disregard it.

MP 32

Gentilcore - cross

JUROR NO. 10: I can disregard it.

THE COURT: Thank you. And you --

JUROR NO. 11: I can disregard it.

THE COURT: And you?

JUROR NO. 12: I can disregard it.

THE COURT: Thank you. And you --

THE ALTERNATE JUROR: I can disregard it.

THE COURT: Very well. Complete the cross-

examination.

CROSS-EXAMINATION

BY MR. LAWLER: (Continuing)

Q You stated that you received reports from Pennsylvania as to the defendant being assigned out there in 1970; is that right?

A Yes.

Q FBI reports from the agent in Pennsylvania?

A Yes, sir.

Q And did that refer to one four-month period in which he was assigned out there?

A I don't know.

Q Is it that you don't know or you don't remember?

A I don't remember.

Q I show you Defendant's Exhibit Q for identification and ask you to look at the last three pages of that,

1 MP 33 Gentilcore - cross

2 and perhaps it will refresh your recollection.

3 A. Yes; it does.

4 Q. Does this refresh your recollection?

5 A. Yes; it does.

6 Q. And was that the time period referred to, a four-
7 month period, in which Mr. O'Connor was assigned to work in
8 Pennsylvania in 1973?

9 A. Yes, sir.

10 MR. LAWLER: I have no further questions, your
11 Honor.

12 THE COURT: Anything further by counsel for the
13 defense?

14 MR. DAMIANI: At this time, I would renew my
15 offer of those exhibits into evidence, your Honor.

16 THE COURT: I have told you, whenever you refer
17 to exhibits you are supposed to name them.

18 MR. DAMIANI: Exhibits Q and R for identification,
19 your Honor.

20 THE COURT: Very well. What is the Government's
21 position?

22 MR. LAWLER: The Government would oppose their
23 introduction as not relevant.

24 THE COURT: Objection sustained.

25 MR. DAMIANI: At this time, I reserve my right to

1 MP 34 Gentilcore - redirect

2 question the witness further until your Honor has decided
3 the motion before you.

4 THE COURT: Make your application at an appropriate
5 time. At this time it is premature.

6 Anything further of this witness?

7 MR. DAMIANI: Not at this time.

8 THE COURT: What does that reservation mean?

9 MR. DAMIANI: As your Honor knows, your Honor is
10 going to decide the application --

11 THE COURT: Well, what do you want to put me on
12 notice about?

13 MR. DAMIANI: I just don't want to put any addi-
14 tional questions to this witness at this time.

15 THE COURT: Sir, the Court directs you to complete
16 your examination of this witness now. I have only one thing
17 before me, and that is the motion which you have made.

18 REDIRECT EXAMINATION

19 BY MR. DAMIANI:

20 Q Mr. Gentilcore, when the Government asked you
21 about those incidents, were you referring to J. & N.
22 Vorchheimer?

23 A Yes, sir.

24 Q And you were referring to Steven Korn or George
25 Korn or Korn & Sons?

1 MP 35 Gentilcore - redirect

2 A. Yes, sir.

3 Q. They are the incidents you are referring to?

4 A. Two of them.

5 THE COURT: Two out of the three?

6 THE WITNESS: Yes, sir.

7 MR. DAMIANI: I have no further questions.

8 THE COURT: Who is the third? Can you tell me?

9 Is that a name already brought out in the trial here?

10 THE WITNESS: Sir, I don't really know.

11 THE COURT: I am going to excuse the jury for a
12 minute or two. I want to clear that up.

13 (The jury left the courtroom.)

14 THE COURT: What about this? When you asked the
15 question about the three did you mean to include Korn as
16 well as the other name? What was the other name?

17 MR. LAWLER: Vorchheimer. This is in the Eastern
18 District. Your Honor, it was Vorchheimer, Korn and Omaha
19 Supply Company, in the Eastern District.

20 THE COURT: In the Eastern District?

21 MR. LAWLER: In the Eastern District.

22 THE COURT: Wasn't there some testimony before
23 us --

24 MR. LAWLER: Yes, your Honor. Mr. Vorchheimer
25 testified and Steve Korn and Mr. Cucurillo testified.

MP 36

Gentilcore -

THE COURT: Why didn't you say that when we were
arguing the point up here. Why didn't you say that your
question dealt with what had already gone into the record?
I thought they were three separate and apart. unidentified
persons. Did I have any basis to think other than that?

MR. LAWLER: No, sir. It's completely my fault.

THE COURT: You bet it is. What's the matter with
you?

What I think has happened here, really -- let me
put it this way -- is that counsel for the defense has weak-
ened his own position by revealing that the question that he
took umbrage at -- and he was right, at the time, I think --
I thought it was entirely outside of the testimony already
adduced. The damage is nowhere near as great, and counsel,
whether he intended to or not, by his question has made the
task easier, because the question that we said should not have
been asked dealt with three units of concern, or packing
houses, two of which have already been dealt with in the
course of the testimony so far.

The Court was laboring under the belief, as the
Government concedes I was laboring under that belief, that
the three meant three other, entirely unrelated establish-
ments, unrelated to the testimony before us, and I did not
want the jury to get the impression that on top of what they

1 AP 37

2 heard here there were three others that said they gave money
3 to the defendant.

4 Actually, two of the three have already been dealt
5 with before the jury. They are not three separate outfits.

6 What do you say to that, counsel for the defense?

7 MR. DAMIANI: As your Honor is, I ^{to} took was con-
8 fused by the questioning, and I respectfully submit that this
9 jury is confused by those answers and those questions.

10 THE COURT: Well, the jury may be confused, but you
11 have no right to be confused. You don't go into areas of
12 this kind like a fool rushing in where angels fear to tread.
13 This is important material. It affects rights of people,
14 and you are supposed to know what you are doing. That goes
15 for both sides.

16 Have you any other questions to ask this witness?

17 MR. DAMIANI: Not of the witness. I have addition-
18 al --

19 THE COURT: Have you any other questions of this
20 witness?

21 MR. DAMIANI: No, your Honor.

22 THE COURT: Bring in the jury, Mr. Clerk.

23 MR. DAMIANI: Your Honor, may I be heard before
24 the jury comes in with regard to additional argument that
25 your Honor asked for?

1 MP 3E

2 THE COURT: When I want it, I will get it. I am
3 considering the jury's convenience now, not yours and not
4 that of counsel for the Government or mine.

5 (Jury in box:)

6 THE COURT: It is almost one o'clock, ladies and
7 gentlemen, and I promised you that I would let you go at
8 one o'clock today, and I am going to carry out my promise.

9 There is no such thing as perfection. In Heaven
10 there might be but not on earth, and so any undertaking
11 always has a certain potential of mistake or error, and what
12 I have in mind is simply this:

13 There is a matter that is going through my head,
14 and it will take more time to deliberate and to reach a
15 conclusion, will take more time than is left between now and
16 one o'clock. I want to think about it. That is my worry,
17 not yours.

18 However, I want you to keep an open mind, as you
19 swore you would. No one should talk about the case or the
20 evidence in the case. Sure, if someone says to you, "What
21 are you doing?" -- you can say, "I'm on a jury." That's
22 all right. But don't reveal what has gone on until the case
23 is over. I know I have told you about that, but I've got
24 to keep telling you, because it is human for some people to
25 forget, and there again we are dealing with imperfections.

1 MP 39

2 I would not say this over and over again if I
3 didn't know that people with good will will commit errors
4 that you feel shamed of. You might not, but someone else
5 just as good as you, might do it. Just because we have a
6 certain strength doesn't say that someone else is not en-
7 titled to certain weaknesses, and we ourselves have certain
8 weaknesses, who claim a lot of strength.

9 The schedule is such that I will have to do the
10 best I can with this trial, bearing in mind other commitments
11 that I have, and I am trying not to let them interfere with
12 the trial.

13 I want to tell you that on Monday there happens to
14 be a Judges' meeting of the Judges of this court that has
15 been set a few weeks ago and that I must attend, and so we
16 will not be able to sit beyond four o'clock on Monday, and
17 I will not be able to see you before twelve-thirty. So you
18 have between now and twelve-thirty Monday to figure out how
19 you are going to get here at twelve-thirty on Monday. Just
20 have lunch before you come at twelve-thirty, because we are
21 going to sit from twelve-thirty until four, and that should
22 not bother anybody particularly. I mean, you are not going to
23 be weakened because you can't eat at one o'clock instead of
24 twelve-thirty. If that is the case, speak up now. I under-
25 stand those things, too. Each one of us has a different

1 MP 40

2 stomach and a different set-up.

3 There is some truth in that, isn't there?

4 JUROR NO. 2: Yes; there is.

5 THE COURT: All these people who think they are
6 very, very smart are constantly overlooking the obvious.

7 I believe in concentrating on the obvious. A lot of people
8 don't, because they think it's too simple, because they want
9 it complicated, and they get themselves involved.

10 There was a great Justice, Mr. Justice Oliver
11 Wendell Holmes, whom I referred to once before in the
12 course of this trial, and he said, in effect, "Keep concen-
13 trating on the obvious and quit chasing after the obscure."
14 And it is by the obvious that we survive, not by the obscure.

15 You get a little pain when you see that happen in
16 a trial, too, many a trial, where the obvious is not given
17 strict attention, and the very complicated is worked out to
18 perfection, and that is what makes for a trial, and all this
19 really means is that you have got to remember that in every
20 trial the wonderful part about a trial is the spontaneity of
21 the unfolding before you, the gushing out sometimes, or the
22 failure to respond fast. All of these things are for you to
23 observe.

24 You are to be assured, then, by me, that there is
25 no trial where the issues are contested, and most of the time

1 NP 41

2 hotly contested, that runs like an automobile that is in
3 perfect condition, because that is an automobile, and we
4 are dealing in the courtroom with human beings and their
5 strengths and weaknesses.

6 That makes some sense, doesn't it?

7 Have a good week end and take care of yourselves,
8 because we need everyone.

9 (Adjourned to May 23, 1977, at 12:30 p.m.)

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2 UNITED STATES OF AMERICA

3 vs

76 Crim 1030

4 JOHN J. O'CONNOR,

5 Defendant

6 New York, N. Y.

7 May 23, 1977 - 10:00 a.m.
8

9 (Trial continued.)

10 (In the absence of the jury:)

11 THE COURT: Gentlemen, I have reflected over the
12 week end on the matter that has been pending before us, and
13 I have not had a chance to read Mr. Damiani's brief, because
14 it was just received, and I want to examine it.

15 So won't you go ahead and orally argue the motion
16 for a mistrial. Since you make the motion, Mr. Damiani, I
17 will ask you to lead off.

18 MR. DAMIANI: Thank you, your Honor.

19 In this case, the defendant argued vigorously
20 against the admission of any alleged similar act, testimony
21 as, one, too remote in time and, two, not convincingly proved,
22 not relevant to the case, because the acts were not sharpened
23 as against the defendant, and it was cumulative in nature.

24 We also argued that its probative value is out-
25 weighed by the prejudice to the defendant.

MP

483

The prosecutor contemplated that he out put in only two of the strongest of the three similar acts. We protested that this indicated his real intent in introducing similar act testimony was to show the defendant is a bad man and not to show the intent.

The Government produced three witnesses who testified regarding two of the three similar acts previously indicated. In his cross-examination of the defendant's first witness, the following testimony was adduced, at page 25 of the trial transcript:

"Q And did you also find in the course of your investigation in Brooklyn that the employees of at least three of the houses said that they did recognize Mr. O'Connor and that in fact they had paid Mr. O'Connor?

"A Yes."

The Court instructed the jury to ignore the testimony and entertained a motion to strike. The defendant moved, and the Court struck the testimony. However, thereafter, the defendant indicated to the Court that it had an application to make prior to moving to strike. The defendant thereafter moved at side bar for a mistrial, noting that the prosecutor had referred to three similar acts on cross-examination but had only presented evidence of two similar acts in the main case.

MP

484

1 The Court thereafter reserved decision, further
2 instructing the jury, at pages 28 through 29 of the trial
3 transcript, and proceeded to ask each juror whether he
4 understood the Court's instructions. The forelady asked
5 the Court to repeat his last statement, at page 29 of the
6 trial transcript. The Court stated in substance that the
7 three episodes mentioned in the prosecutor's examination
8 should be disregarded and that the names of these people were
9 not even known. The Court obviously felt, as it had every
10 reason to feel, that the three episodes mentioned were en-
11 tirely new instances, whereas the testimony actually related
12 to three episodes of which two had already been put in
13 evidence in the prosecutor's main case, over the defendant's
14 objection.

15 The jury was thus led to concentrate on these
16 alleged similar acts and led to believe that five similar
17 acts had occurred.

18 The Court then asked each juror if he could follow
19 the Court's instructions and could ignore these episodes.

20 At page 30, Jurors Numbers 1 through 8 answered
21 that they could follow the Court's instructions. Juror Number
22 9 answered, "I could disregard it, but I have a little
23 difficulty. The Court admonished the juror to answer the
24 question, whereupon he answered that he could disregard the
25

1 MP

2 testimony.

3 The remaining jurors also answered that they could
4 disregard the testimony.

5 In subsequent redirect examination, the Court was
6 made aware of the fact that the three episodes were not en-
7 tirely new ones, that two had been previously testified to.

8 The Court dismissed the jury and clarified the facts
9 with counsel. The jury was recalled and given a general in-
10 struction that they should keep an open mind -- that included
11 that they should keep an open mind -- a that in general
12 the obvious, not the obscure should be concentrated on.

13 The jury was dismissed until the following Monday,
14 which is this morning.

15 Your Honor, the defendant contended earlier that
16 the introduction of alleged similar act testimony was pre-
17 judicial in this case and would divert the jury's attention
18 to irrelevant issues. It is obvious at this time that the
19 alleged similar act testimony has become the focus of this
20 trial. The jury's attention has been diverted by this
21 testimony, to the defendant's immediate prejudice. It is
22 now obvious that the jury believes that five alleged acts
23 exist.

24 The extraneous testimony has overwhelmed and en-
25 gulfed the central issues in this case. The defendant

1 MR

486

2 believes that the Judge's instructions do not cure the situa-
3 tion to result in a fair trial for the defendant and moves
4 for a mistrial.

5 THE COURT: I want to be sure that I don't forget
6 this:

7 Counsel indicated that Juror Number 9 wanted to add
8 something. It was obvious to me, by the tone of voice and
9 the words that he employed that he could obey the Court's
10 instructions, but what was troubling him was something else.
11 I didn't want him to reveal that something else, for fear it
12 might be prejudicial. It was something that he should take
13 up with his fellow jurors at the appropriate time.

14 I want it distinctly understood that I got the
15 clear impression from Juror Number 9 that what he was launch-
16 ing into was an additional matter that had nothing at all to
17 do with the inquiry I was then conducting.

18 We have an opportunity, as judges, to watch the
19 behavior of jurors during the course of the trial. It was
20 Juror Number 9 who has his own individuality, as every person
21 really should have. It was, however, Juror Number 9 whom I
22 had to tell to stop taking notes, and the record will reveal
23 that.

24 I get the impression, which I have always had since
25 we began, that we have a very conscientious, devoted jury,

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487

2 and I don't want to appear to criticize Juror Number 9 for
3 taking notes. That is just natural for a man who wants to
4 be mighty sure he doesn't forget something that has been
5 called to his attention. But he is given to loquaciousness,
6 and that is not a fault, but it is not a juror's place to
7 open up while he is talking to the Judge, and that is the
8 reason I halted at him, because I was convinced that he was
9 going into something else.

10 The record will also show that after he got through,
11 or after I stopped him, he then repeated what he had said in
12 the first place, and that is that he would disregard what was
13 brought out, which the Judge said was inadmissible.

14 That is the Court's reaction to counsel's comment
15 with regard to what Juror Number 9 had to say.

16 All right. Go ahead, Mr. Lawler.

17 MR. LAWLER: Thank you, your Honor.

18 Your Honor, the motion for a mistrial has been de-
19 rived essentially from the Government's cross-examination of
20 the defendant's witness. The defendant called to the stand
21 FBI Agent Gentilcore, who was in charge of this particular
22 case, United States versus O'Connor. He was the assistant
23 investigator, who assisted at the trial of this case.

24 The defendant questioned the witness, Agent
25 Gentilcore, extensively about the preparation that he had

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488

2 undergone and about the questioning which he had done and
3 the search he had conducted for potential witnesses against
4 the defendant.

5 The defense questioned Mr. Gentilcore as to the
6 meat houses which he had -- or the people in the meat houses
7 whom he had interviewed over in Brooklyn. The defense
8 elicited a list of such meat houses, which Agent Gentilcore
9 testified that he had in fact gone to, that he had shown
10 them photographs of indicted meat inspectors, and he asked
11 them if they had paid any such meat inspectors.

12 At this time I do not remember whether he had also
13 asked them specifically if they had paid Mr. O'Connor. How-
14 ever, there is no question but that the defendant in the
15 direct examination of Agent Gentilcore brought out extensively
16 the work that Agent Gentilcore had done in Brooklyn in trying
17 to find more witnesses, and in fact Agent Gentilcore said
18 that he had interviewed these people knowing they were co-
19 operating with the Government with the express hope of find-
20 ing additional witnesses.

21 It is thus clear that the door was opened by de-
22 fense counsel's questions of Agent Gentilcore, and under the
23 rules the Government believes it had the perfect right and
24 obligation to go into the matter further on cross-examination.

25 Further, your Honor, the defense left a false

MP

489

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2 impression by its questioning of Agent Gentilcore that he
3 had interviewed all of the e people, people at all of these
4 meat houses, and that he hadn't found any witnesses against
5 the defendants. So under the doctrine of completeness, the
6 Government was allowed to cross-examine Agent Gentilcore as
7 to precisely what he had found in his questioning of these
8 different meat houses, and the Government elicited from Agent
9 Gentilcore the fact that some of the individuals in the meat
10 houses did not remember that O'Connor had worked for them.
11 Another individual remembered that O'Connor had worked for
12 him for a couple of days, and three indicated that they had
13 recognized Mr. O'Connor, and in fact they had given Mr.
14 O'Connor things of value, and I think it was brought out that
15 some meat houses said that they had not given anything to Mr.
16 O'Connor.

17 So under the rules there are two distinct theories
18 under which this cross-examination was allowable and in
19 fact, your Honor, was required of the Government. One is
20 under the doctrine of completeness, in bringing out the full
21 story of what Agent Gentilcore had found when he went out to
22 Brooklyn; the other is the scope of cross-examination. It had
23 certainly been gone into by defense counsel, and the Govern-
24 ment was allowed to go into it on cross-examination.

25 In addition, your Honor, if there had been any

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2 prejudice -- and the Government does not concede for one
3 second that there has been -- but if there had been, on re-
4 direct examination defense counsel brought out that two of
5 the three houses which indicated that they had given some-
6 thing of value to Mr. O'Connor were the J. & N. Vorcheimer
7 and Korn & Sons, both of which were produced in the Govern-
8 ment's direct testimony.

9 (So at most, your Honor, we are not talking about
10 five potential similar act witnesses. We are talking about
11 three similar act witnesses.

12 In addition, your Honor, there is no cause for
13 prejudice here, because your Honor directed that this testimony
14 be stricken and polled each individual member of the jury in
15 very complete and individual fashion, so there is no question
16 that there wasn't any question of prejudice in the minds of
17 the jurors. The entire matter was stricken from the record.

18 Finally, your Honor, I think the cases show that a
19 mistrial should be granted only under the most extreme circum-
20 stances, and any prejudice that may have arisen here has
21 certainly been cured not only by defense counsel's redirect
22 but also by your Honor's instructions to the jury, and the
23 Government contends that there are no grounds, your Honor,
24 for striking the testimony; but, even if there were, any
25 problems have certainly been cured by your Honor's instruc-

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491

2 tions.

3 THE COURT: Do you want to say anything by way of
4 reply?

5 MR. DAMIANI: If I may, please, your Honor.

6 THE COURT: Yes, sir.

7 MR. DAMIANI: The Government has referred to the
8 fact that defense counsel has opened the door on its examina-
9 tion with regard to the areas of inquiry concerning the list
10 prepared by Agent Gentilcore. Although defense counsel at-
11 tempted to ask questions with regard to the results of those
12 lists and those interviews, counsel for the Government has
13 taken exception to the questions and the answers, and the
14 exceptions were sustained by the Court.

15 Counsel for the defense again attempted to place
16 into evidence the results of those interviews and tried to
17 do it by introducing the 302 results of Agent Gentilcore,
18 which were made in the regular course of his duties in in-
19 vestigating the particular case, and again the Government
20 objected, and again the Government was sustained.

21 I respectfully submit that the defendant did not
22 intend nor did he leave with this jury any improper inference
23 or false impression with regard to the occasion and the re-
24 sults of those particular incidents, because counsel was
25 particular in identifying that the two similar acts that were

MP

492

discussed on the people's direct case were those similar acts of Vorcheim and George Korn, and the prosecutor specifically and the witness referred to those as being incidents of his report.

I directly did not inquire of the witness as to any third act, because obviously there was no third act, because obviously there is no third act in this case. The people argued initially that they had three similar acts. Then they chose not to put in those three similar acts. It did not open the door to any third act.

I respectfully submit that as a result of not having opened the door with regard to any third act or similar acts, other than the two that were questioned about when Agent Gentilcore was on the stand on direct examination, and the Korn & Sons and the Vorcheim matter, that it was improper cross-examination by the Government to get into these additional acts or third act.

I respectfully submit that this witness, Gentilcore, is not to be considered as an ordinary witness. This is a Government witness, your Honor. This is an adverse witness, even though he was called by me. I respectfully submit that he is in charge of this particular case, and therefore the questioning and the answers by both the prosecution and the witness himself were voluntary questions and voluntary answers.

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493

2 that went well beyond the cross-examination, and I respect-
3 fully submit that the answers to the questions were strictly
4 prejudicial, and in essence what the prosecutor has been
5 allowed to do is to get in by the back door that which he
6 chose not to present on his direct case.

7 I respectfully submit that the jury, although we
8 know what occurred -- and we are dealing with the same two
9 acts -- the jury has before it a third act, which remains
10 unexplained, and I respectfully submit that there is no amount
11 of instructions that could be given by the Court at this time
12 in the proceedings which would in any way cure the prejudice
13 that has come to the defendant, Mr. O'Connor by this situation.

14 MR. LAWLER: Your Honor, the questioning which the
15 Government did object to of Agent Gentilcore -- those objec-
16 tions were based on two grounds. The first was the relevancy
17 of the particular matters that were going into by the de-
18 fense, and secondly the highly leading questions which were
19 put to Agent Gentilcore, which were the reasons for the
20 Government constantly objecting during his examination.

21 There was no objection that Agent Gentilcore was
22 a hostile witness, and the Government believes that there was
23 no reason for those leading questions.

24 THE COURT: Well, I am going to examine the defend-
25 ant's memorandum, but I am quite sure that what I am about to

MP

494

say will eventuate.

I have changed my mind on many occasions as a Judge, but I want to share with you my reaction to all of this.

In the first place, let us get away from the idea that the Court has any notion whatever that these three so-called instances were under the doctrine of similar acts. Not at all. That was never our discussion. We have never had any discussion at all dealing with those three acts being among the similar acts. For all I know, they could have occurred contemporaneously with the time of the testimony in chief.

In other words, they might very well have occurred while the episodes testified to before this jury were happening, so that in the robing room and in open court there was never any notion by me that I was going to treat these three items as similar acts.

The Government was wrong. I still say the Government is wrong. The Government had no right to ask that question, and I said so then, and I say it again. I think that the right to cross-examination is a lot of poppycock under the circumstances in this case.

Counsel for the defense had distinctly and repeatedly indicated to us in the robing room and in the presence of

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495

2 Mr. Lawler that he intended to bring out that there was an
3 investigation that caused a great number of people to deny any
4 contact with O'Connor.

5 Mr. Lawler in the robing room correctly stated that
6 that did not make what was actually done of no value and
7 that kind of testimony had no bearing whatever, that a man
8 can lead a model life and suddenly succumb to doing that which
9 is contrary to the kind of existence that was characteristic
10 of him, and I joined Mr. Lawler in that expression.

11 I thought that it was inadmissible, clearly inad-
12 missible, and I kept emphasizing it; but counsel was per-
13 sistent, as he had a right to be.

14 Then came a time when counsel said in effect, *any*
15 "Judge, I told the jury in my opening that I was going to
16 prove that the meat industry thought well of my client, that
17 they held him in high regard" -- words to that effect --
18 and here you are going to prevent me from eliciting that kind
19 of testimony, and the result will be that the jury will think
20 that I have not made good on my promise."

21 Mr. Lawler had insisted that I prevent, even a
22 single word from coming out, that I should throttle it at
23 the very outset, that the record should be made that the
24 Government objected and that I should sustain the objection,
25 feeling the way I had, and that we should not go into open

1 MP

496

2 court with this matter at all.

3 Well, sympathizing with counsel's position, I
4 capitulated. I said, "All right. You go ahead, ask your
5 question out in the open court. I am quite sure I am going
6 to wind up making the same ruling, but you will have a record
7 that you attempted to get this in," and I did not go for it,
8 so to speak. I held it inadmissible.

9 Well, the questions that counsel for the defense
10 put to the witness on direct were lengthy but innocuous,
11 really. He never got a word out of the witness with regard
12 to whether or not the witnesses he had gone to spoke well or
13 ill of the defendant, nothing at all. In fact, the Government
14 succeeded in accomplishing what it had hoped, and that is
15 that the Judge would rule inadmissible that testimony even
16 if the questions were properly put, whereupon counsel offered
17 Exhibits Q and R, marked for identification, as I remember
18 it, two documents which were a part of the investigation,
19 and I then took a position at the side bar: "Inadmissible".

20 Well, the Government having succeeded, what was
21 the need for any cross-examination? How can a lawyer lay
22 a foundation except by asking a lot of questions: "Did you
23 see A? Did you talk to B? Did you talk to C? Did you talk
24 to X in the meat packing industry?" There was nothing to
25 warrant the cross-examination, and Mr. Lawler confessed that

1 MP

497

2 he asked that question, that dangerous question, without
3 knowing that those three instances related to any of the
4 testimony that had theretofore been adduced. In other words,
5 he was content to ask a question with regard to three addi-
6 tional meat packing concerns, and he knew that that was so,
7 because he admitted it.

8 Now he comes into court, and he says he had a per-
9 fect right to cross-examination. The Court cannot accept that
10 at all. What happened -- and we have to face up to it:
11 that doesn't necessarily mean that the Court has to rule
12 that counsel is right in moving for a mistrial, but I think
13 that a fair analysis of what took place and that precipitated
14 this unfortunate situation should be made clear on the record.

15 I make mistakes, and I confess to them. The
16 Government made a mistake here, which is human, and, having
17 admitted it, sticks by it. I wish to place on the record
18 that, to my amazement, two out of the three instances related
19 to testimony already adduced, and therefore the damage was of
20 no significance, hardly any significance at all. If I had
21 known that, I don't think I would have even polled the jury.
22 As counsel well know, at the time I polled the jury I was
23 under the impression, because neither one of the lawyers had
24 alerted me to the contrary, that these three instances re-
25 lated to episodes or meat packing concerns who had given money

MP

498

1 to this defendant over and above any of the names thereto-
2 fore listed. That is what was damaging at the time, but it
3 has been diluted and almost removed completely by the testi-
4 mony given by Gentilcore on questioning by Mr. Damiani, in
5 which it was revealed that two out of the three items related
6 to the very charges or counts embraced in the indictment.

7
8 There are occasions when a lawyer at his peril under-
9 takes to cross-examine. It is a lesson to be well learned.
10 There are times when you say, "No questions."

11 It is the Judge who has to steer the ship. There
12 is a mistaken impression afoot that when lawyers do their
13 job all the Judge is doing is nodding his head. That is a
14 stupid impression, just plain stupid. The Judge goes along
15 with you every split second of the trial to keep that ship
16 of justice on an even course, and I was given an unnecessary
17 burden by virtue of this episode.

18 I see nothing to Mr. Damiani's assertion that Mr.
19 Lawler went around the back way or used the back door. Mr.
20 Lawler did this honestly, fairly, intending to do the right
21 thing, but he flopped on that one episode, in the Court's
22 opinion, and I am so ruling.

23 I also say that Mr. Damiani had a purpose, I now
24 see, in proceeding in the way that he did. It makes it clear
25 to me, counsel, to be absolutely candid, that this whole

MP

499

1
2 venture by you with regard to this particular item of bringing
3 these things out to the jury and your plea to me that you
4 wanted to make good or make the jury feel that you were
5 trying to do what you said in your opening were designed by
6 you, I am convinced, by innuendo or by inference to get
7 across to the jury that there was a raft of meat packing
8 outfits that gave the defendant no money at all, that he
9 neither asked for it nor received it, and that is what I
10 felt at the time I polled the jury, and the more I have
11 thought about it, the more my reaction becomes solid.

12 This is a court of law, and the Judge, under his
13 oath, has to call them as he sees them. I had to call that
14 to the attention of the jury. If I thought that the jury
15 entertained what counsel is suggesting, I would not for a
16 moment hesitate to grant the motion.

17 I want to know right now: who was the third name?
18 Only two were given. Who was the third? The third. Don't
19 you know by this time?

20 MR. LAWLER: Omaha Hotel Supply Corporation.

21 THE COURT: Was that referred to at all in the
22 course of the trial?

23 MR. LAWLER: Not to date, your Honor.

24 THE COURT: Very well.

25 I told the jury I would have them out at twelve-

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500

thirty. I will announce a decision finally on the motion. There is nothing in the law that says I've got to do it right this minute, and I don't intend to, because my policy has always been, for good or for bad, to read every memorandum that counsel labor to give to the Judge. Some lawyers don't do any of it; some do, and those who do ought to be encouraged by the fact that the Judge is going to read what has been handed up to the Court.

For your own guidance, I am quite positive, still keeping a reservation -- that ultimately will be the ruling of the Court. I repeat -- and I don't hesitate to say it that way, even though I run the danger that counsel will say that, "He made up his mind before he even read my memorandum. Do you know how many hours I gave to this over the week end, a burden I should not have had? I got the minutes, too, as well as counsel did, and I read every word of them. I pondered the significance of what had happened.

Very well. Please step aside for a minute or two, while I call another matter.

MR. DAMIANI: May it please the Court, following the completion of that other item and before the jury comes in, may I place some other matter on the record before your Honor?

THE COURT: What other matter?

MP

501

MR. DAMIANI: The letter that I received from the office of the United States Attorney. On Friday, when I got back, a letter came that I had notified the Government of an alibi defense.

THE COURT: I won't go into it now. The jury has come in early, and I want to go on with the trial. When there is an intermission I will hear you. I don't want to throttle anybody.

(Recess, during which another matter was heard.)

(In open court; jury present.)

THE COURT: Good afternoon, ladies and gentlemen. I was on the bench at noon, but the lawyers had to argue a matter before me, and then there was another matter that I had to take care of.

MR. DAMIANI: Defendant calls Mr. Saint Pierre at this time, your Honor.

THOMAS V. SAINT PIERRE, called as a witness by the defendant, being first duly sworn, testified as follows:

THE COURT: Mr. Saint Pierre, I say this to all witnesses, and I want you to listen carefully, because we have been through the trial up to this point, and I don't want anything to happen which would cause a mistrial.

You are a sworn witness. Don't let me have any

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

76 Cr. 1030 (IBC)

JOHN J. O'CONNOR,

Defendant

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT
OF ITS MOTION TO REMOVE A JUPOR AND FOR
A MISTRIAL

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The law regarding steps to be taken when improper and prejudicial evidence is brought to the attention of the jury during the course of a criminal trial is easily stated. In United States v. Simone, 205 F. 2d. 480, 483 (2d. Cir. 1953), the court stated:

"It is the general rule that error in admitting evidence may be cured by instructing the jury to disregard it; but where the character of the evidence is such that the jurymen are unlikely to be able to blot it from their minds despite the court's later instruction to do so, a mistrial should be granted. H. Holt v. United States, 10th Cir. 94 F. 2d. 90, 94; Mora v. United States, 5th Cir., 190 F. 2d. 749, 752."

The granting of a mistrial thus turns on the finding that limiting instructions cannot erase the prejudice from the jurors' minds. The Supreme Court has long recognized that the court's instruction can only go so far in assuring that the minds of the jurors are free of bias. Throckmorton v. Holt, 180 U. S. 552, 21 S. Ct. 474, 45 L. Ed. 663 (1901). In Bruton vs. United States, 391 U. S. 123, 135, 88 S. Ct. 1620, 1627, 206 L. Ed. 476 (1968), the Court said:

"[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

In Marshall v. United States, 360 U. S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d. 1250, the Court held that the trial court had abused its discretion in not granting defendant's motion for a new trial. There,

newspaper articles printed during the trial had come to the attention of seven individual jurors. The judge called the jurors individually into his chambers, questioned them regarding possible prejudice, and, since he was convinced that the jurors could render a fair and impartial decision, denied defendant's motion for a mistrial. The Supreme Court noted that the prejudice received from publications was almost as great as that derived from a prosecutor's evidence at trial, and held that the mistrial should have been declared.

In Odom v. United States, 377 F. 2d. 853 (5th Cir. 1967), the court declared a mistrial should have been granted when a policeman testified for the prosecution that defendant had frequently been in and out of jail. The court said at 860 that,

"The attempt to sanitize testimony by admonition may sometimes succeed but its success will very often depend upon how virulent the diseased testimony was."

In United States v. DeDominicis, 332 F. 2d. 207 (2d. Cir. 1964), a Government witness implied on redirect that there was an association between defendant and a known purveyor of narcotics. The trial court struck the testimony and issued cautionary instructions to the jury, but refused defendant's motion for a mistrial. The Second Circuit held at 210 that the court committed error in not granting a mistrial because ". . . it [was] too difficult a task for the jury successfully to put out of mind the alleged connection." In United States v. Malinsky, 153 F. Supp. 321 (S.D.N.Y. 1957), the trial court granted a mistrial where the

prosecutor in his opening made frequent and important references to his first witness. The witness suffered a heart attack in the middle of direct testimony. The trial court granted defendant's motion for a mistrial because

"It could not be safely predicted that an instruction given by the Court to the jury to disregard the references to Levine in the prosecutor's opening would achieve the desired results of eradicating the prosecutor's remarks." Malinsky, supra at 323.

In this case, the defendant argued vigorously against the introduction of any alleged similar act testimony. We argued that it was not probative because it was (1) too remote in time, (2) not convincingly proved, (3) not material in the case because intent and plan were not "sharpened" issues, and (4) not necessary to the Government's case because it was cumulative. We also argued that, even if probative, its probative value was far outweighed by the unfair prejudice to the defendant. When the prosecutor indicated that he contemplated only putting on the two strongest of the three similar acts, we protested that this indicated his real intent in producing similar act testimony was to try to show the defendant as a "bad man", and not to show intent and plan. The court allowed the prosecutor to put in similar act testimony as part of its main case to show intent and plan. The Government produced three witnesses who testified regarding two of the three similar acts previously mentioned.

In his cross-examination of defendant's first witness, the following testimony was adduced (p. 25):

"Q. And did you also find in the course of your investigation in Brooklyn that the employees of at least three of the houses said that they did recognize Mr. O'Connor and that in fact they had paid Mr. O'Connor?

A. Yes. "

(Emphasis supplied)

The court instructed the jury to ignore the testimony and entertained a motion to strike. Defendant so moved, and the court struck the testimony. Defendant moved for a mistrial, noting at sidebar (p. 26) that the prosecutor had referred to three similar acts on cross-examination but had only presented evidence of two similar acts in its main case. The court reserved decision, further instructed the jury (pp. 28-29) and proceeded to ask each juror whether he understood the court's instructions. The forelady asked the court to repeat his last statement (p. 29). The court instructed her in substance that the three episodes mentioned in the prosecutor's cross-examination should be disregarded, and that the names of these three people were not even known (p. 29). The court obviously felt, as it had every reason to feel, that the three episodes mentioned were entirely new instances, whereas the testimony actually related to three episodes of which two had already been put in evidence in the prosecutor's main case over defendant's objection. The jury was thus led to concentrate on these alleged similar acts, and led to believe that at least five similar acts had occurred. The court then asked each juror if he could follow the court's instruction and ignore these three

additional episodes. (p. 30) Juror No. 1-8 answered that they could follow the judge's instruction. Juror No. 9 replied when questioned, "I will disregard that, but I have a little bit of difficulty." (p. 31). The court admonished the juror to answer his question, whereupon he said that he could disregard the testimony. The remaining three jurors said that they could also disregard the testimony.

In subsequent redirect examination the court was made aware of the fact that the three episodes were not entirely new ones and that two had previously been testified to (p. 35). The court dismissed the jury (p. 35) and clarified the facts with counsel (pp. 35-38). The jury was recalled (p. 38) and given a general instruction that they should keep an open mind and that in general the obvious, not the obscure, should be concentrated on. The jury was dismissed until the following Monday.

Defendant contended earlier that the admission of alleged similar act testimony was unduly prejudicial, and would divert the jury's attention to collateral issues. It is apparent at this time that similar act testimony has indeed become the focus of the trial. The jury's attention has been unduly diverted by this collateral material, to defendant's great and irremedial prejudice. It is probable that most of the jurors now believe that evidence of five similar acts exists. Extraneous alleged similar act testimony has overwhelmed and engulfed the truly relevant and central evidence. Defendant believes that curative instructions could not possibly assure that this jury could render a fair

and impartial decision and respectfully moves for the removal of a juror and a mistrial.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA

-v-

: 76 Cr. 1030 (IBC)

JOHN O'CONNOR,

:
Defendant.
-----x

MEMORANDUM IN OPPOSITION TO
MOTION FOR A MISTRIAL

Defendant called to the stand the FBI agent assigned to investigate the defendant's case. During his direct examination of the witness the defense established that the witness had made up a list of establishments in the Eastern District of New York to which the defendant was assigned as an inspector. In response to questions by defense counsel the witness stated that he had visited these establishments, which he also knew to be cooperating with the Government, shown them photos of the meat inspectors who had been indicted and asked them if they had paid such inspectors, including defendant.

On cross examination the Government established that some of the people interviewed had said they did not remember the defendant and others said that the defendant had not worked in their plant. The witness also said that three of the establishments had stated that they paid the defendant. On redirect defense established that one of the companies was J and N Vorscheimer and another was George Korn and Sons, both of which had been part of the similar acts proof in the Government's case.

The cross examination of the witness was proper and should have been allowed but in any case does not provide a basis for a mistrial. Rule 611(b) of the Federal Rules of Evidence allows cross examination into the subject matter of the direct examination. In its direct examination the defense had elicited information about the witness' activities in attempting to determine if other meat companies had paid the defendant. The defense had opened the door and it was proper for the Government to follow through and pursue this line of questioning.

In addition the questions were proper in order to correct the false impression made by the defense in its direct examination that the efforts of the witness to find additional evidence had not been successful. United States v. Harvey, 526 F.2d 529, 536 (2nd Cir. 1975); United States v. Finkelstein, 526 F.2d 517, 527 (2nd Cir. 1975).

Even if there had been prejudice defense counsel corrected it by eliciting the fact two of the three meat companies which had said they paid defendant were part of the Government's similar act case.

And finally the Court struck the entire testimony, instructed the jury that they should disregard such testimony and conducted an individual voir dire of the jury to insure that they understand the courts instruction.

There is no basis for the declaring of a
mistrial.

Respectfully submitted,

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Southern District of New York
Attorney for the United States
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Assistant United States Attorney

- of Counsel -

1 MP J. O'Connor - direct

2 A I never handed out any brands.

3 Q Mr. O'Connor, you heard Mr. Jacobson testify here,
4 from Frank Strassburger?

5 A Yes; I did.

6 Q Did you ever take any meat, money or things of
7 value from Maurice Jacobson?

8 A I absolutely did not.

9 Q Did you know Mr. Jacobson before you became an
10 inspector?

11 A Yes; I did.

12 Q Do you know the other owner, or the owner, Mr.
13 Schoenweiss, I believe his name was, before you became an
14 inspector?

15 A You mean at Harlem Pork Center?

16 Q Yes.

17 A Yes; I did.

18 Q Do you know Mr. Kupferberg?

19 A Yes; I did.

20 Q Before you became an inspector?

21 A Yes; I did.

22 Q Did you ever take any money, meat or other things
23 of value from Mr. Kupferberg?

24 A I absolutely did not.

25 Q Did you ever take any money, meat or things

MP

J. O'Connor - direct

590

1 of value from Mr. Maurice Jacobson, from West Harlem Pork
2 Center?
3

4 A. No, sir; I did not.

5 Q. How did you know Mr. Kupferberg before you became
6 an inspector?

7 A. I was a scaler at Strassburger. He would purchase
8 meat products. I would weigh them out and bill them to him
9 and charge him.

10 Q. How often would he make these purchases while you
11 were at Strassburger?

12 A. Several times a week.

13 Q. And in what volume are we talking about, Mr.
14 O'Connor?

15 A. Do you mean weight volume?

16 Q. Yes.

17 A. A thousand pounds.

18 Q. Where was Mr. Kupferberg's plant at that time in
19 relation to the Strassburger plant?

20 A. On the opposite side of the avenue, a half a block
21 south.

22 Q. You say you would have to weigh these. Can you
23 tell us why you would be doing the weighing back at the
24 Kupferberg plant?

25 A. He used to like to ship right from where he bought

MP

J. O'Connor - direct

594

supervision of our department and as to inspectors. His brother was suffering highly from hypertension, a general nervous condition, and that any problems should be addressed to several foremen or himself. He preferred it rather than his brother get upset.

Q During your time with Vorcheim, did you have anything to do with Arthur Vorcheim?

A No, sir.

Q During that period of time, whom would you address any complaints to at that plant?

A At Vorcheim, a fellow named Vincent, or Arthur Vorcheim.

Q You heard Arthur Vorcheim say that you accepted money?

A Yes, sir.

Q Did you ever accept money or meat or things of value from him?

A No, sir.

Q While you were at Vorcheim, do you recall what other plants you had to inspect?

A Yes, sir.

Q Will you name them, please?

A Al Eckstein, Omaha Hotel, Manhattan Veal - I believe, S. & S. Meats.

MP

J. O'Connor - direct

595

Q Again, was Mr. Korn --

MR. DAMIANI: Strike that, please. I am sorry.

Q You heard the testimony of Mr. Cucurullo, did you not?

A Yes, sir.

Q When you were assigned to those plants, do you recall what your tour of duty was?

A Six a.m. to two-thirty.

Q That was at the George Korn plant?

A Yes, sir.

Q Do you recall ever seeing Mr. Cucurullo?

A Yes, sir.

Q When and where and under what circumstances would you see Mr. Cucurullo?

A I would see him at approximately two-thirty in the morning.

Q And where would you see him, Mr. O'Connor?

A Out on the street.

Q What was he doing while he was there?

A Lining up trailer trucks for unloading.

Q What were your duties at that time with regard to that plant?

A I would not have reached that plant yet. It would be too early in the morning.

1 MP

J. O'Connor - direct

596

2 Q In what --

3 MR. DAMIANI: Strike that, please.

4 Q Where was the Korn plant in relation to the other
5 plants on your schedule that you would be examining?6 A It would be on the corner of Atlantic Avenue and
7 South Elliott, Brooklyn.8 Q Would it be first, second or third in the line of
9 plants that you had to inspect?

10 A It would be last.

11 Q It would be last?

12 A Yes, sir.

13 Q Would your duties necessarily include the inspec-
14 tion at the George Korn plant of the meat coming in, when
15 you observed Mr. Cucurullo?

16 A Yes.

17 Q And after observing that and inspecting that,
18 would you be required to go through the plant?

19 A Yes.

20 Q Whom would you say you spoke with during your in-
21 spection of the George Korn & Son plant during the time that
22 you were assigned there?

23 A Cutting floor foreman.

24 Q Did you ever go to Mr. Cucurullo with any problems
25 whatsoever?

1 MP J. O'Connor -direct 597

2 A. No, sir.

3 Q. Did you know that he was the person you were suppose
4 to see?

5 A. I only knew Mr. Cucurullo as Cookie. He was always
6 outside. He had nothing to do with inside, apparently.

7 Q. And are you telling me that it was the people in-
8 side the plant that you would deal with as an inspector?

9 A. Yes, sir.

10 Q. If there were any problem with regard to the meat
11 or the manner in which the tables were kept, whether they
12 were clean or unclean, you would discuss it with the people
13 inside and not with Mr. Cucurullo?

14 A. Yes.

15 Q. Were those your instructions?

16 A. There were no definite instructions.

17 Q. And was it the duty of the persons inside to take
18 your advice or your suggestions?

19 A. There was a foreman: Bill.

20 Q. What was his name?

21 A. His name was Bill. I don't remember his last
22 name now.

23 Q. Did you ever take any money, meat or other things
24 of value from Mr. Cucurullo?

25 A. No, sir; I did not.

1 MP J. O'Connor - direct

2 Q Prior to your transfer, did you have occasion to
3 have a discussion with a member of the Department of Agri-
4 culture?

5 A Yes, sir.

6 Q Was that person Mr. McCormack?

7 A Yes; it was.

8 Q What was his position at the time?

9 A Assistant supervisor.

10 Q And was this conversation prior to your being
11 transferred?

12 A Yes.

13 Q And during the conversation, did the subject of
14 undercover meat inspectors come up?

15 A Yes, sir; it did.

16 Q And did you tell Mr. McCormack, that you had know-
17 ledge that there were undercover meat inspectors in the in-
18 dustry?

19 A Yes, sir; I did.

20 Q Is that the only person that you had made this
21 disclosure to?

22 A Yes, sir.

23 Q Mr. O'Connor, you heard the testimony of Mr.
24 Jacobson, Maurice Jacobson, Mr. Kupferberg and the other
25 Jacobson. You also heard the testimony of Mr. Cucurullo, and

MP

J. O'Connor - direct

610

1 you heard the testimony of Mr. Vorcheim.

2 A. Yes, sir.

3 Q Did you ever accept meat, money or other things
4 of value from any of those individuals?

5 A No, sir; never.

6 MR. DAMIANI: I have no further questions, your
7 Honor.

8 THE COURT: Can you commence your cross-examination
9 now, and go on until four o'clock, Mr. Lawler?

10 MR. LAWLER: I could go ahead, your Honor, but I
11 would prefer to do it all at once.

12 THE COURT: Well, you see, I was not told about all
13 of this testimony, and I was kept in the dark about it until
14 I called the jury out, and I have no way of measuring those
15 things unless I am told, "Judge, this will take me such and
16 such a period of time." I can't fashion my own schedule
17 unless I know.

18 Has Mr. Stapleton arrived? Will you find out whe-
19 ther he is here, Mr. Clerk? Let's see what goes on there.

20 (Pause.)

21 THE CLERK: He is here, your Honor.

22 THE COURT: How long would it take you to question
23 Stapleton, Mr. Damiani, approximately?

24 MR. DAMIANI: Approximately ten minutes, your Honor.
25

1 MP

O'Connor - cross

2 Q Excuse me. Your family has essentially grown
3 up and developed here in the Greater New York City area,
4 including Bay Shore, Long Island; is that correct?

5 A That is correct.

6 Q And when you were first appointed a meat inspector
7 you turned down an opportunity to work in Albany, I think you
8 testified. Albany, New York.

9 A That's correct.

10 Q And then, in 1975, you transferred to Pennsylvania
11 as a meat inspector, didn't you?

12 A That is correct.

13 Q You moved your whole family out there, didn't you?

14 A Yes, sir.

15 Q And you were an inspector, a meat inspector, for
16 approximately six years; is that correct?

17 A Seven years.

18 Q And you testified that you didn't take any money
19 from any of the meat houses in which you inspected. Did you
20 ever take any meat from the meat houses in which you in-
21 spected?

22 MR. DAMIANI: Same objection, your Honor. Are
23 we concerned about the time of the indictment?

24 THE COURT: Yes; I think that objection is well
25 taken. Fix the period.

MP

O'Connor - cross

639

Q From 1972 through 1975, did you ever take any meat,
accept any meat from any of the houses that you inspected?

MR. DAMIANI: Again, your Honor --

THE COURT: He is not confined on a question like
that. He has a right to search into the motives and intent
and purpose of this defendant. This defendant has said he
never took anything, and I am sure he didn't confine it only
to the period within the indictment.

The objection is overruled.

MR. DAMIANI: Thank you.

THE COURT: That means, Mr. Witness, at any time,
did you ever take any meat from any of the packing houses
that you were inspecting, at any time since you became an
inspector.

A. I recall one incident.

Q Did you inspect the Omaha Hotel Supply Company?

A. Yes, sir.

Q Do you know Myron Bernstein, the foreman in that
company?

A. I don't know the name Myron Bernstein.

Q Did you take a package of meat from Omaha Hotel
Supply Company when you were an inspector there?

A. No, sir; I did not.

Q Did you ever take any package of meat from Omaha

- 1 MP O'Connor - cross 640
- 2 Hotel Supply Company when you were an inspector there?
- 3 A. I absolutely did not.
- 4 Q But, Mr. O'Connor, you just told us in cross-
- 5 examination just a minute ago that you do remember one inci-
- 6 dent in which you did take meat; is that correct?
- 7 MR. DAMIANI: Your Honor, I believe the prosecution
- 8 is misreading the questions of yesterday --
- 9 THE COURT: Sir, I don't know whether you are re-
- 10 sorting to a strategy that causes you to interrupt the examin-
- 11 ation, but I am going to rule that unless it is tenable I
- 12 shall overrule the objection. The objection is overruled.
- 13 Now, repeat the question, Mr. Court Reporter, now,
- 14 and let us proceed.
- 15 (Question read.)
- 16 A. That entire question is not correct.
- 17 THE COURT: What part of it is correct, Mr.
- 18 O'Connor, what what part is incorrect?
- 19 THE WITNESS: The part that is incorrect is that
- 20 I did not testify that I took meat from any or all or en-
- 21 compassing. You asked me directly, did I receive any moneys,
- 22 meats or other favors from F. Strassburger, West Harlem or
- 23 Kupferberg. I testified truly, no, I did not.
- 24 MR. LAWLER: May I proceed, your Honor?
- 25 THE COURT: Proceed. He is finished with his answer.

1 MP.

O'Connor - cross

641

2 Q Mr. O'Connor, I am not talking about my questions
3 to you this morning. I am talking about your testimony on
4 direct examination yesterday, when you were asked if you had
5 taken anything of value from the meat houses that you inspect-
6 ed, and you said that you had not.

7 THE COURT: Wait a minute. What is it, sir?

8 MR. DAMIANI: Your Honor, may I approach the side
9 bar?

10 THE COURT: No. State it in open court.

11 MR. DAMIANI: Your Honor, I never asked that ques-
12 tion.

13 THE COURT: The jury is here, and their recollac-
14 tion prevails. Just because you say you didn't ask the
15 question doesn't make it so. If the question is without
16 function, the jury will recognize it.

17 I will allow the question.

18 (To the witness:) Did you so testify yesterday,
19 Mr. O'Connor?

20 THE WITNESS: No, sir; I did not.

21 Q You are testifying now that from Omaha Hotel Supply
22 Corporation you never received any packages that contained
23 meat that would be marked with three X's to identify them,
24 did you?

25 A I never received any packages.

- 1 MP O'Connor - cross 642
- 2 Q Now, during the seven years that you were a meat
- 3 inspector, did you ever get any packages or any tips from
- 4 the inspectors --
- 5 MR. LAWLER: Question withdrawn. I am sorry.
- 6 Q During the seven years that you were a meat
- 7 inspector, did you ever get any packages or any tips from
- 8 the packers that you inspected during Christmas time?
- 9 A I recall one incident.
- 10 Q Is this the same incident that you just referred
- 11 to a minute ago when you said you recalled one incident in
- 12 which you took meat, or is this a different incident?
- 13 A The same incident, sir.
- 14 Q Did you ever take any liquor from any of the
- 15 packers that you inspected during the years 1972 to 1975?
- 16 A No, sir.
- 17 Q Did you ever accept a drink or a beer after work
- 18 from any of the packers that you inspected during that time
- 19 period?
- 20 A No, sir.
- 21 Q Did you ever accept a cup of coffee from any of
- 22 the packers that you inspected during that time period?
- 23 A In my career, yes.
- 24 Q During the time period 1972 to 1975?
- 25 A Yes, sir.

- 1 MP O'Connor - cross 643
- 2 Q Did you ever accept, aside from the cup of coffee,
3 anything worth anything more than a cup of coffee, anything
4 else of value, except for the one instance which you have
5 admitted, from the packers that you have inspected?
- 6 A I did not.
- 7 Q Were you ever offered money or meat or liquor by
8 any of the packers which you inspected from 1972 to 1975?
- 9 A During that period, no.
- 10 THE COURT: Well, now, wait a minute. What do
11 you mean, "During that period, no"? Was there a period when
12 you did? I don't quite get the answer.
- 13 THE WITNESS: You are asking me a date, '72 to '75.
14 My answer is no.
- 15 THE COURT: All right. Next question.
- 16 Q Prior to that time, from 1971 to 1972, when you were
17 an inspector, did any of the packers offer you any money or
18 packages of meat or liquor?
- 19 A I recall one incident.
- 20 Q Is this the same incident that you referred to?
- 21 A Yes, sir.
- 22 Q So your testimony is that the only time you were
23 offered a package of meat, I believe you testified you took
24 a package of meat in that instance. The only time you were
25 offered, that's the time you took; is that your testimony?

1 MP

O'Connor - cross

644

2 A. I did not testify to a package.

3 Q. Whatever it was, whatever it was contained in, you
4 just testified that that is the one time in which you were
5 offered something of value, aside from a doughnut and a cup
6 of coffee, and you also testified that that is the one time
7 in which you took something; is that not correct?

8 A. Yes, sir.

9 THE COURT: I think it would be advisable if instead
10 of giving any years you would say, "During the time from the
11 day that you became an inspector" up until such date as you
12 wish to fix, as long as he was an inspector. Then there will
13 be no question about it.

14 MR. LAWLER: Yes, your Honor.

15 MR. DAMIANI: If it please the Court, may I have
16 a continuing objection to that line of questioning?

17 THE COURT: Yes.

18 Q. Now, you heard Murray Jacobson say in this court-
19 room that when you were an inspector in his plant he gave
20 you \$25 every week in which you were there, and you are saying
21 that he is a liar; is that not correct?

22 A. That is correct.

23 Q. And you are saying also that Morris Kupferberg,
24 when he came in and testified that he gave you \$15 every
25 week in which you were an inspector is a liar; is that correct?

1 MP 27

2 there is a stipulation to that effect. That is not denied,
3 but no matter how many stipulations there are, you the jury
4 must be satisfied beyond a reasonable doubt as to each
5 element or factor, and that is Element Number One.

6 Now, what is the second element that must be
7 proved beyond a reasonable doubt? You must find that the
8 person, firm or corporation alleged to have given the money
9 to this defendant was engaged in interstate commerce and that
10 its meat was inspected by inspectors of the United States
11 Department of Agriculture.

12 There is no contest on that, either, so you won't
13 have much trouble with that element.

14 What is the third element that must be established
15 beyond a reasonable doubt? You must find that Mr. O'Connor
16 accepted money from the person, firm or corporation. You
17 must find that he accepted the money in connection with or
18 arising from his official duty. The purpose or intent with
19 which the money was given and with which it was accepted is
20 absolutely not relevant to a finding of guilt. If he was
21 an inspector at the time and if the company was engaged in
22 interstate commerce and if he took money, no matter for what
23 purpose, the taking of the money under this section of law,
24 if a jury is convinced of it beyond a reasonable doubt --
25 not beyond all possible doubt -- establishes the guilt re-

816

1 NP 28

2 quired by law.

3 Let me pause for a while.

4 There are various sections of law relating to
5 bribes. Even though the same evidence placed before you
6 points to a failure or not to a failure on the part of this
7 defendant with regard to the carrying out of his official
8 duties, that hasn't got a thing to do with it. There is no
9 charge that this defendant looked away when he should have
10 been looking and getting it corrected, and even though there
11 might be some evidence here to that effect, that is not
12 essential to prove the case against him. There is no charge
13 here that he undertook to avoid the performance of a duty.
14 That does not make the charge fatal. He is charged under
15 that particular section of law that says that the mere taking
16 of money or a thing of value without doing anything corrupt
17 or improper other than the taking of the money -- the very
18 taking of the money constitutes the offense.

19 The law says that it is a crime for an inspector
20 to accept money if it is given for any purpose or intent
21 whatsoever. If an inspector accepts money in connection with
22 his official duty, it doesn't make any difference what the
23 purpose was or what was in his mind or in the giver's mind.
24 Money or things of value accepted by an inspector in connec-
25 tion with his official duties from the company he was

817

1 MP 29

2 inspecting is sufficient to establish the crime charged; and
3 so, really, that is the heart of the case before you.

4 We are not talking about a loan. There has been
5 no contest or any argument about that. We are talking about
6 money given to the inspector, this defendant, at the time he
7 was an inspector assigned to a particular meat plant.

8 It is not a defense that the defendant was not
9 influenced in his work and would have inspected just the same
10 whether he took the money or not. It makes no difference
11 whatever -- I repeat: it makes no difference that he was a
12 good or efficient inspector, and even if he received high
13 commendations for his work and never missed a thing, if he
14 took money knowing he was taking it and took it in connection
15 with his work as an inspector at the meat plant that he was
16 officially assigned to inspect, if you are convinced of that
17 beyond a reasonable doubt -- not beyond all possible doubt --
18 and if you are satisfied beyond a reasonable doubt of all
19 the other elements that go to make up the offense, then he
20 is guilty, provided, of course, I repeat, that the evidence
21 as to each element satisfies you beyond a reasonable doubt.

22 And what is the fourth element that must be
23 established beyond a reasonable doubt? You must find that
24 the inspector received the money knowingly and wilfully,
25 that is, he knew what he was doing when he took it, and he

1 MP 30

2 did not take it merely by accident or mistake or misunder-
3 standing as to what he was doing.

4 The exact dates when the money was accepted and
5 the exact amounts are not critical. For example, if an
6 indictment charges \$25 and the actual amount received was
7 \$50 or vice versa, or he received \$2, the amount does not
8 decide the issue. It is what the evidence reveals. That
9 kind of exactitude cannot possibly be put in an indictment.

10 Don't you see, the law is not the ass that so many
11 people are so ready to denounce. The law knows that human
12 nature is such that when you start taking, even though you
13 do nothing for it, then the next step is to take for doing
14 something for it. That is as old as mankind. It doesn't
15 matter if he did not take money every day of the week or
16 every week of the month or if they did not follow, one week
17 after another. If he took money on a date that is reason-
18 ably within the dates fixed in the indictment, a date that
19 is not far from actuality, that is sufficient under law.

20 Now, what does the law mean by the words "knowing-
21 ly and wilfully"? Well, I think those words are self evident,
22 but I have to charge it. What does the law mean by those
23 words? It means pretty much what your common sense tells
24 you the words "knowingly and wilfully" would stand for.

25 In considering each of these three counts, you must

1 MP 31

2 determine whether the Government has proved beyond a reason-
3 able doubt that this defendant acted knowingly and wilfully.
4 The words "knowingly and wilfully" just simply mean this:
5 that the Government does not have to show that this defend-
6 ant knew he was breaking a particular law before he can be
7 convicted of a crime. They do not mean that the Government
8 has to show that Mr. O'Connor intended to profit at the
9 expense of the Government or any other person, nor do they
10 have anything to do with Mr. O'Connor's personal or private
11 reasons for violating the statute if you find that he did,
12 for if, after considering all the evidence in accordance with
13 my instructions to you, you come to the conclusion that he
14 violated the statute, in that event his personal or private
15 reasons for violating the statute are absolutely of no con-
16 sequence so far as his guilt is concerned.

17 An act is done knowingly if it is done voluntarily
18 and purposely and not because of mistake, accident, neglect
19 or some other innocent reason. An act is done wilfully if
20 it is done knowingly and deliberately and with an evil
21 motive or purpose.

22 "Unlawfully" means contrary to law. Hence, to do
23 an act unlawfully means to do something contrary to law.
24 In essence, then, the phrase "knowingly, wilfully and un-
25 lawfully" means doing something in a voluntary and deliberate

1 MP 32

2 fashion. That is about all there is to it.

3 The intent to take it must be proved beyond a
4 reasonable doubt, that is, that while an official inspector
5 he intended to take money or things of value and did actually
6 take it.

7 I have been at this for almost an hour. I think
8 I have about a half hour more, possibly a little more than
9 that, and I think it would be a good idea, Mr. Clerk, to
10 announce a short recess.

11 (Recess.)

12 THE COURT: I want to thank you for your attention
13 and your patience. You don't know what else is coming,
14 and that is what undoubtedly is responsible for keeping you
15 on the alert.

16 I once heard with my own ears the late James Farley
17 tell of an episode that occurred at the height of his
18 popularity. He sat on the first tier of a five-tier banquet
19 at the Hotel Waldorf Astoria. It was an important occasion,
20 an important public cause, and celebrated a great event, and
21 there was a great deal of happiness and expectation.

22 On his left he found that there was a Chinese
23 gentleman who was making little notes. Mr. Farley did not
24 know him. When the soup was served and finished, at a loss
25 to know how to converse with this Chinese gentleman, he

MP 36

829

it to you by example, and the combination ought to bring it home to you.

This is important: if circumstantial evidence is believed, it is of no less value than direct evidence. That is the law. There is no law that says you can only convict on direct evidence. The law, to the contrary, says that you can convict on direct and circumstantial evidence or circumstantial evidence being most of the total proof and very little direct evidence. That is up to you; but both are evidence and both can be weighed, assessed and determined. Regardless of the type of evidence, direct or circumstantial, the only requirement is that the totality of the proof, circumstantial or direct or all of one or all of the other -- the totality of the proof must be beyond a reasonable doubt -- not beyond all possible doubt -- as I have explained "reasonable doubt" to you.

Now, there has been considerable reference to similar acts. There is nothing complicated about it. I have told you about it at the time, and I am going to repeat what I said and possibly enlarge on it, but I don't think there is anything that is complicated about the proof relating to similar acts other than those recited in the indictment.

You know, we did take testimony about acts alleged to have taken place at a time other than that recited in

1 MP 37

2 the indictment. You remember that. Will you indicate to me
3 by nodding your heads? Do you, Mr. Purcell? You do, too,
4 I am sure.

5 That particular testimony of similar acts means
6 similar to the acts relating to the indictment. You are not
7 asked to consider a gun charge relating to a prior act. You
8 are not being asked to consider something dealing with
9 drugs. You are asked to consider the evidence of similar
10 acts, similar to the type of acts charged in the indictment,
11 to wit, bribe taking, taking of money by an inspector while
12 he is assigned to a meat plant, but at a different time.
13 That is all it amounts to.

14 Well, what about this evidence? Is that another
15 charge? No; it is not another charge. You take that evi-
16 dence relating to similar acts, and you put it together with
17 the evidence relating to the charges before you in order to
18 determine intent, what the intent was of this defendant at
19 the time alleged in the indictment. It is additional proof
20 relating to intent but nothing else. I would not take it if
21 it was to relate to anything else. It has to relate only to
22 intent or a plan followed or pursued by the accused. It is
23 not received in order to show bad character. It is not re-
24 ceived in order to point out that he did it before the
25 dates alleged in the indictment and therefore he must have

1 MP 38

2 done it with respect to the acts alleged in the indictment.
3 Not at all. It is additional evidence with respect to the
4 issue of intent to take.

5 The law says that is admissible only for that
6 purpose. The law simply says:

7 "Acts and conduct similar to those charged in the
8 indictment, if you so find, may be considered circum-
9 stantial evidence on the issue of this defendant's
10 criminal knowledge, intent, plan and preparation with
11 respect to the charges embraced in the indictment."

12 I will repeat that.

13 "Acts and conduct similar to those charged in the
14 indictment, if you so find, may be considered circum-
15 stantial evidence on the issue of this defendant's
16 criminal knowledge, intent, plan and preparation with
17 respect to the charges embraced in the indictment."

18 It goes to his intent, and that is the only reason
19 it is received. It is not received to show that he is a
20 person of bad character. It is received, I repeat, and may
21 be considered by you only on the issue of criminal intent
22 of the defendant or criminal knowledge, intent, plan or
23 preparation with respect to the charges embraced, or set
24 forth, in the indictment.

25 It is not received to show that if he committed

1 MP 39

2 illegal acts before he must have done it with regard to the
3 acts charged. I repeat: it is not at all for that purpose.
4 It is additional evidence -- that is all its purpose is --
5 evidence of similar acts. It is additional evidence going
6 to the intent, the plan, the purpose of the defendant with
7 respect to the acts charged in the indictment.

8 I have a habit, good or bad, of stopping long
9 enough to ask a jury, "Did you get it?" I do this because
10 if anybody doesn't get it, I am going to say that no matter
11 what it takes to bring it home to you, I will do it. I can
12 break it down into simpler terms.

13 These are not easy things to get -- nobody knows
14 that better than I -- and I say that without hesitancy,
15 because I have talked to jurors over and over again over
16 the years after the rendition of verdicts. I listened to
17 them. I didn't seek them out; they sought me out. And when
18 I talked with them, I naturally asked, "What was difficult?
19 What was easy? I want to learn from it, and so don't
20 hesitate."

21 "Judge, I didn't quite get all of it."

22 If you feel that way, speak up, and let me make
23 it clear. And so I ask you, does anybody feel that you
24 find it uncertain what I have just charged with regard to
25 similar acts? If so, just raise your hand, and I will

1 MP 40

2 approach it from another way.

3 All right. You want me to go on.

4 What has the law to say when a defendant takes the
5 stand? This defendant took the stand. He testified before
6 you. He was not obligated to do that. I went into that very
7 thoroughly at the beginning of the charge. There is no law
8 that says he has to take the stand. He could remain entirely
9 silent. He doesn't have to call any witnesses or produce
10 any proof of any kind, written or oral, no obligation whatso-
11 ever, and you wouldn't have the right, even for a split
12 second, to hold it against him if he did so remain silent,
13 because the obligation to prove his guilt is on the Govern-
14 ment, to prove it beyond a reasonable doubt, not beyond all
15 possible doubt.

16 But the defendant did take the stand. The law
17 permits a defendant at his own request to testify in his
18 own behalf. I should tell you, and I think I told it to you
19 possibly when you were being selected, that if a defendant
20 chooses not to take the stand and chooses not to give any
21 evidence in his own behalf, he has a perfect right to do so,
22 and no jury has a right under the law to hold it against him.

23 I have developed that as much as I think I can.

24 But what does the law have to say when a defendant
25 does take the stand? You must determine how far his testimony

1 MP 22

2 this defendant separately, of course, with a violation of
3 the same law or the same statute. That law reads, in pertin-
4 ent part, as follows:

5 "Any inspector authorized to perform any of the
6 duties prescribed by the Federal Meat Inspection Act,
7 who shall receive or accept from any person, firm or
8 corporation engaged in commerce any gift, money or
9 other thing of value, given with any purpose or intent
10 whatsoever shall be . . ." guilty of a crime.

11 What is the purpose of that act? Congress has
12 said that the Meat Inspection Act is necessary in order to
13 protect the health and welfare of the consumer. In part,
14 the statutory purpose is found in these words:

15 "Meat and meat products are an important source
16 of the nation's total supply of food. They are consumed
17 throughout the nation, and the major portion thereof
18 moves in interstate or foreign commerce. It is essential
19 in the public interest that the health and welfare of
20 consumers be protected by assuring that meat and meat
21 food products distributed to them are wholesome, un-
22 adulterated and properly marked."

23 And so Congress made it a crime for a Federal
24 meat inspector to receive or accept money from any person,
25 firm or corporation engaged in interstate commerce. The clear

1 MP 23

2 purpose of this law is to protect the public from the conse-
3 quences of corruption in public service. This is necessary
4 so that the community may have the benefit of objective
5 evaluation and unbiased judgment on the part of those who
6 participate in the making of official decisions and who have
7 power over other citizens.

8 There are three obvious dangers to the public that
9 this statute seeks to prevent. One danger is that unsanitary
10 and unwholesome meat can be sold if meat inspectors are not
11 vigilant. The second danger is that meat packers who pay
12 money to meat inspectors will receive better treatment from
13 the inspectors than packers who do not make these payments.
14 Another danger is that if meat inspectors take money from
15 the people they are regulating, that might cause the public
16 to believe that other public officials are corrupt and
17 that belief threatens the heart of our entire system of
18 Government.

19 It has been observed -- and this is what you should
20 consider -- that society deals sternly with bribery, which
21 would substitute the will of an interested person for the
22 judgment of the public official as the controlling factor in
23 official decisions.

24 The statute plainly proscribes such corrupt
25 interference in the normal and proper function of the

1 MP 2

2 Government itself.

3 Mr. Clerk, may I have the indictment?

4 Here is the indictment. It isn't too long. Be
5 patient with me.

6 "The grand jury charges:

7 "1. The Federal Meat Inspection Act enacted on
8 December 15, 1967, as Title I of the Wholesome Meat
9 Act, requires the Secretary of Agriculture to provide
10 for the inspection of establishments where meat and meat
11 food products are processed.

12 "2. At all times relevant to this indictment,
13 the defendant, John J. O'Connor, was an inspector,
14 officer and employee of the United States Department
15 of Agriculture meat and poultry inspection program,
16 authorized to perform the duties required by the
17 Federal Meat Inspection Act of 1967.

18 "3. At all times relevant to this indictment,
19 the West Harlem Pork Center, Ltd., located at 2350
20 Twelfth Avenue, New York, New York, was engaged in
21 interstate commerce and was inspected by inspectors,
22 officers and employees of the United States Department
23 of Agriculture meat and poultry inspection program,
24 pursuant to the Federal Meat Inspection Act of 1967.

25 "4. At all times relevant to this indictment,

1 MP 83

2 MR. DAMIANI: I would except to the Allen charge.

3 THE COURT: All right. Bring in the jury.

4 (Jury in box:)

5 THE COURT: Ladies and gentlemen of the jury, we
6 received during the last few minutes a note from you which
7 reads:

8 "We have a hung jury."

9 I would like very much to say a few words to you
10 at this juncture.

11 You have deliberated now for many hours -- I should
12 think, offhand, six, possibly eight hours -- without agreeing
13 upon a determination of the principal fact issues in the
14 case.

15 I want to make it clear that what I am about to say
16 to you is not with a view to coercing you into reaching a
17 verdict, certainly not to rush you into a verdict or in any
18 way to indicate impatience with your failure to have arrived
19 at a verdict by this time.

20 I have no desire to persuade those jurors who
21 have, after thorough consideration and deliberation and
22 argument, have reached a conclusion to change that conclusion.
23 I do believe, however, that some remarks by the Court may
24 possibly aid you in your deliberations.

25 This is an important case to both sides. The trial

1 MP 84

2 of this case was comparatively simple. The fact issues have
3 been sharply delineated. The trial has been expensive to
4 both sides. If you should fail to agree on a verdict, the
5 case is left open and undecided. Like all cases, it must
6 be disposed of some time. There appears absolutely no reason
7 to believe that another trial would not be equally expensive
8 to both sides, nor does there appear any reason to believe
9 that the case can be tried again more exhaustively than it
10 has been on either side.

11 You must remember that, like surgery, to which I
12 often refer, a great deal of work by the doctors goes in
13 long before surgery, sometimes for years. An enormous amount
14 of work has gone into this case before you ever entered the
15 box.

16 Any future jury must be selected in the same manner
17 and from the same source as you have been chosen. So there
18 appears no reason to believe that the case would ever be
19 submitted -- and I say this in measured tones, looking at
20 each one of you -- I see no reason to believe that the case
21 would ever be submitted to twelve jurors more intelligent,
22 more impartial or more competent to decide it.

23 It took three hours to select you, in the first
24 place.

25 Nor is there any reason to believe that more or

873

1 MP 85

2 clearer evidence could be produced on behalf of either side.

3 While undoubtedly the verdict of the jury should
4 represent the opinion of each individual juror, it by no
5 means follows that opinions may not be changed by conference
6 in the jury room. The very object of the jury system, as I
7 pointed out to you in my main charge, is to secure unanimity
8 by a comparison of views and by arguments among the jurors
9 themselves.

10 It is normal for jurors to have differences. We
11 judges have differences. The justices of the Supreme Court
12 of the United States fight and denounce for the sake of a
13 principle and yet arrive at a determination. Nothing worth
14 while is decided the way you would an ordinary bill of
15 goods. Remember, I said it would take some starch out of
16 you, and you see how right I was.

17 And so you have got to argue among yourselves.
18 There is nothing wrong about that. That shows you are inter-
19 ested, and it is normal, therefore, for jurors to have
20 differences, just the way it is normal for judges to have
21 differences. And you argue it out, and you fight it out,
22 and you reason with one another.

23 Frequently, jurors, after extended discussion,
24 may find that a point of view which originally represented
25 a fair and considered judgment might well yield upon the basis

1 MP 86

2 of argument and on the basis of further discussion and upon
3 a further review of the facts and the evidence. Frequently,
4 further consideration may indicate that a change of original
5 attitude is fully justified upon the law and the facts.

6 I quote from a statement which is contained in an
7 opinion by the United States Supreme Court:

8 "Although the verdict must be the verdict of each
9 individual juror, they should listen with a disposition
10 to be convinced of each other's argument; that if the
11 much larger number were for conviction, a dissenting
12 juror should consider whether his doubt was a reason-
13 able one which made no impression upon the minds of
14 other jurors equally honest, equally intelligent as
15 himself or herself. If, on the other hand, the majority
16 were for acquittal, the minority ought to ask themselves
17 whether or not they might reasonably doubt the correct-
18 ness of the judgment which was not concurred in by the
19 majority."

20 It cannot be that each juror should go into the
21 jury room with a blind determination that the verdict shall
22 represent his or her opinion of the case at that moment or
23 that he should close his or her ears to the arguments of men
24 and women who are equally honest and equally intelligent as
25 himself or herself, who bear the same responsibility, who

MP 87

875

serve under the same sanction of the same oath and who have heard the same evidence with the same attention and with an equal desire to arrive at the truth.

Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence, but remember also that after full and deliberate consideration of all the evidence it is your duty to agree upon a verdict if you can do so without violating your individual judgment and conscience.

Finally, I will ask each one of you, with the great respect in which I hold each one of you, to retire to the jury room to continue your deliberations and carefully reconsider and re-examine all the evidence bearing upon the questions before you.

Please continue with your deliberations.

(At 9:45 p.m., the jury left the courtroom to resume deliberating upon a verdict.)

(At 10:55 p.m.:)

THE COURT: It is now five of eleven, and I might suggest that we consider sending in a note to the jury reading: "Has the jury arrived at a verdict to any one of the three counts?" This will be "Yes" or "No". They may be under the impression that they cannot come in with a verdict until they have arrived at a verdict on all of the three

876

1 MP 88

2 counts. If they say yes, we can find out how far they have
3 gotten, and then the Judge will have to decide to continue
4 them tonight or continue them tomorrow, depending on their
5 answer.

6 Now, I don't want to do this unless both sides
7 think it is advisable. Don't do me any favors. Let's see
8 if this might give us an insight as to whether they are likely
9 to arrive at a verdict tonight or whether we should send them
10 home tonight in the next fifteen minutes.

11 I don't know what to do, because I am not going to
12 judge a cat in a sack. I don't know what is going on there.
13 It is none of our business, really.

14 What does the Government think?

15 MR. LAWLER: The Government has no objection.

16 THE COURT: What does the defendant think?

17 DAMIANI: The defendant has no objection.

18 COURT: All right. I am going to add the hour,
19 which is 10:55, and I think we also ought to say, "Please
20 place your answer in a sealed envelope", and I am going to
21 sign the note "Judge Cooper".

22 Mark this as a Court's exhibit, Mr. Clerk. Do it
23 on the back, so they won't get confused.

24 (Court's Exhibit 4 marked for identification.)

25 (Recess.)

1 MP 89

2 THE COURT: The answer just came to my last note,
3 in which we asked the jury as to whether they had arrived
4 at a verdict as to any one of the three counts, and the
5 answer is no.

6 Bring in the jury, please.

7 (Jury in box:)

8 THE COURT: It is now about six minutes after
9 eleven, and we have the answer that you have not yet arrived
10 at a verdict on any one of the counts.

11 By this time you may be a little brain-weary, and
12 I see no purpose in having you continue at this late hour.
13 Arrangements have been made, as I told you, to take you
14 home. You go on home and be back here tomorrow morning at
15 ten-thirty and continue with your deliberations. It goes
16 without saying that you must not talk about this matter or
17 the evidence in any way. The law is that once you are in
18 deliberation, you are in deliberation until you have concluded
19 your deliberations, and your deliberations are not concluded
20 as of this moment.

21 I am sure counsel join me in saying to you that we
22 appreciate the spirit which you have brought to your undertaking.
23 We have little doubt that you are doing your best.
24 You will have to continue doing your best.

25 Thank you and good night, ladies and gentlemen.

1 MP 90

2 Take the jurors, marshal, and see that each one is
3 taken home.

4 Tomorrow morning, return promptly at ten-thirty.

5 A JUROR: Is it possible I could drive my car
6 home?

7 THE COURT: Certainly. I thought I would like to
8 be sure that you were taken home by the United States
9 marshal. Come back tomorrow at ten-thirty.

10 (Adjourned to May 26, 1977, at ten-thirty a.m.)

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1 MP 91

2 UNITED STATES OF AMERICA

3 versus

76 Crim 1030

4 JOHN J. O'CONNOR,

5 Defendant.

6 New York, N. Y.

7 May 26, 1977 - 10:30 a.m.

8
9 (Trial continued.)

10 (Jury in box:)

11 THE COURT: Circumstances prompt further observa-
12 tions from Judge to jury.

13 The jury room is for your exclusive use. No one
14 has a right to enter without your permission. It is per-
15 fectly understandable that voices will be raised in the
16 cause of justice, but bear in mind that if hollering is re-
17 sorted to, the words uttered may be heard by those passing
18 by the jury room door.

19 For example, close to eleven p.m. last evening --
20 will you look at me, Mr. Purcell?

21 JUROR NUMBER 3: I am listening.

22 THE COURT: Yes, but I want you to look. You don't
23 seem to be ever looking at the speaker. Please look at me
24 as I speak to you.

25 At approximately eleven p.m., last evening, after

880

MP 92

consultation and agreement by the attorneys on both sides, I sent you a note inquiring whether the jury had arrived at a verdict with respect to any one of the three counts. Our objective was simple. If your answer was in the negative, I had in mind not delaying you any further, sending you home without any further delay, and that is exactly what eventuated.

However, after several minutes and immediately before your response was handed to the marshal, a loud male voice was heard to scream out, "Don't give him any information on any count."

Assuming that was said, I merely wish to urge you to lower your voices, and I wish to make the observation that that type of contribution, if true, to jury deliberation has no value whatever.

Sending in that note is a practice that has been indulged in over the decades, pursuant to law, and when it is done in order to aid the convenience of jurors, the failure of anyone to recognize the kindly spirit that prompted the inquiry is particularly distressing.

JUROR NUMBER 4: Your Honor --

THE COURT: No, don't, please. Don't say anything. Don't say anything.

JUROR NUMBER 4: I am listening.

THE COURT: Listen and learn.

I feel compelled, even if it only benefited one

1 MP 93

2 jurors only, to repeat my remarks of yesterday evening.

3 You have deliberated now for a great number of
4 hours -- I said that at a time when you had been deliberating
5 six or eight hours -- without agreeing upon a determination
6 of the principal fact issues in the case.

7 I want to make it clear that what I am about to
8 say to you is not with a view to coercing you into reaching
9 a verdict, certainly not to rush you into a verdict or in any
10 way to indicate impatience with your failure to have arrived
11 at a verdict by this time or to persuade those jurors who,
12 after thorough consideration, deliberation and argument, have
13 reached a conclusion, to change that conclusion. That is not
14 my purpose.

15 I do believe that some remarks by the Court may
16 possibly aid you in your deliberations.

17 This is an important case. The trial of this case
18 was comparatively simple. The fact issues have been sharply
19 delineated.

20 The trial has been expensive to both sides. If
21 you should fail to agree on a verdict, the case is left
22 open and undecided. Like all cases, it must be disposed of
23 at some time. If it is left open, we have got to start
24 afresh, the way we did at the beginning of this week, when
25 you were being selected.

MP 94

882

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2 There appears absolutely no reason to believe that
3 another trial would not be equally expensive, nor does there
4 appear any reason to believe that the case can be tried
5 again more exhaustively than it has been on either side.
6 Any future jury must be selected in the same manner and from
7 the same source as you have been chosen. So there appears
8 no reason to believe that the case would ever be submitted
9 to twelve jurors more intelligent, more impartial or more
10 competent to decide it or that more or clearer evidence
11 could be produced on behalf of either side.

12 While undoubtedly the verdict of the jury should
13 represent the opinion of each individual juror, it by no
14 means follows that opinions may not be changed by conference
15 in the jury room, and I pointed out that judges have done it;
16 I have done it; I am not ashamed to do it. After further
17 consideration, I may be heard to say over the years, "Counsel,
18 I have decided that I am going to alter my position." That
19 doesn't require guts. That is nothing more than decency
20 ordinary, common, garden-variety decency.

21 The very object of the jury system is to secure
22 unanimity by comparison of views and by arguments among the
23 jurors themselves. It is normal for jurors to have differ-
24 ences, and I pointed out how judges have differences, and
25 they are quite violent and positive about their differences,

883

1 MP 95

2 and never have I heard any Judge urge, "Hurry up with your
3 decision so I can go home." Not once. It has always been
4 a case of fighting for a principle, fighting for something
5 that the judge believed in, so that when we parted you
6 couldn't help but salute the Judge for his vigor and his
7 earnestness, even though you thoroughly disagreed with him.

8 Frequently, jurors, after extended discussion,
9 may find that a point of view which originally represents
10 a fair and considered judgment might well yield upon the
11 basis of argument, upon the basis of further discussion and
12 upon a further review of the facts and the evidence.

13 Frequently, further consideration may indicate
14 that a change of original attitude is fully justified upon
15 the law and the facts.

16 Then I read to you what the Supreme Court of the
17 United States has had to say, and I will read it to you
18 again.

19 "Although the verdict must be the verdict of each
20 individual juror, they should listen with a disposition
21 to be convinced of each other's argument; that if the
22 much larger number were for conviction, a dissenting
23 juror should consider whether his doubt was a reason-
24 able one which made no impression upon the minds of
25 other jurors equally honest, equally intelligent as

1 MP 96

2 himself or herself. If, on the other hand, the majority
3 were for acquittal, the minority ought to ask them-
4 selves whether or not they might reasonably doubt the
5 correctness of the judgment which was not concurred in
6 by the majority."

7 It cannot be that each juror should go into the
8 jury room with a blind determination that the verdict shall
9 represent his or her opinion of the case at that moment or
10 that he should close his or her ears to the arguments of
11 men or women who are equally honest, equally intelligent as
12 himself or herself, who bear the same responsibility, who
13 serve under the same sanction of the same oath and who have
14 heard the same evidence with the same attention and with an
15 equal desire to arrive at the truth.

16 Remember at all times that no juror is expected
17 to yield a conscientious conviction he or she may have as to
18 the weight or effect of evidence, but remember also that
19 after full and deliberate consideration of all the evidence
20 it is your duty to agree upon a verdict if you can do so
21 without violating your individual judgment and conscience.

22 Consequently, I will ask you to retire to the
23 jury room to continue your deliberations and reconsider and
24 re-examine all the evidence bearing upon the questions that
25 you must resolve in order to bring in a verdict.

885

MP 97

I have every confidence that each of you will fulfil your mission in accordance with your oath and your conscience. It would be unthinkable to hold out because a juror does not like the personality of another juror. What has that to do with the achieving of justice? I am sure none of you will sit in stolid silence, sit on your hands and turn away your head, but that you will respect the views of others and listen to them and that you, by your attitude, will encourage everyone to speak out.

I have done my utmost to keep the ship of justice on a straight course. I have had to weather many aggravating episodes throughout this trip, none of which you are aware of. Every bit of it was worth while, so long as in the end justice prevails.

Will you also bear in mind that others seeking justice -- and there is a long list -- are waiting for their turn, and each looks to judge and jury to fulfil their duty so that they may come forward with their grievances, which also demand resolution by judge and jury?

Continue with your deliberations. Mr. Clerk, will you announce a recess.

(Recess.)

(At 12:00 noon)

(In the absence of the jury:)

1 MP 107

2 A F T E R N O O N S E S S I O N

3 2:10 p.m.

4 (In the absence of the jury.)

5 THE COURT: Since we were last here in the court-
6 room, I have received a note from the jury, which reads:

7 "The jury no longer requires the testimony of
8 Bernard Jacobson or Kupferberg. Jury still requests
9 the testimony of Thomas O'Connor."

10 Bring in the jury.

11 (Jury in box.)

12 THE COURT: We have your note, which reads:

13 "The jury no longer requires the testimony of
14 Bernard Jacobson or Kupferberg. Jury still requests
15 the testimony of Thomas O'Connor."

16 Mr. Court Reporter, will you please proceed.

17 (The reporter read, in open court, the testimony
18 of the witness Thomas O'Connor.)

19 THE COURT: Thank you, Mr. Court Reporter.

20 Ladies and gentlemen, will you retire to continue
21 your deliberations, please.)

22 (At 2:35 p.m., the jury left the courtroom to
23 resume deliberating upon a verdict.)

24 (At 5:40 p.m.)

25 THE COURT: A few minutes ago the jury sent a note,

1 MP 108

2 which is very, very succinct and full of expectation, and it
3 reveals nothing. It reads, "We are now ready."

4 Very well. Bring in the jury.

5 (Jury in box.)

6 (The roll of jurors was called. All answered
7 present.)

8 THE CLERK: Madam Forelady, have you agreed upon a
9 verdict?

10 THE FORELADY: Yes; we have.

11 THE CLERK: How do you find the defendant on
12 Count 1?

13 THE FORELADY: Guilty.

14 THE CLERK: How do you find the defendant on
15 Count 2?

16 THE FORELADY: Guilty.

17 THE CLERK: How do you find the defendant on
18 Count 3?

19 THE FORELADY: Not guilty.

20 THE CLERK: Members of the jury, listen to your
21 verdict as it stands recorded. You say you find the defend-
22 ant guilty on Count 1 and Count 2 and not guilty on Count 3.
23 So say you all?

24 THE COURT: Poll the jury.

25 (Each juror, upon being asked by the clerk whether

897

MP 109

the verdict as recorded was his or her verdict, responded affirmatively.)

THE COURT: Ladies and gentlemen of the jury, before you leave, I want to detain you for a few minutes. What I am about to say I would say if your verdict was the very opposite. I would say it if at this hour you had come back and said "Not guilty" on each one of the three counts. Why? Because I am not going to talk about the verdict. That was your business. That is what I emphasized all along: that you are the judges of the facts.

What I am going to talk about is the wonderful show of spirit that you exemplified throughout. I have little doubt that you must have each said to yourself, "Have I the capacity to undertake so vital a mission? It seems to be bigger than I am. It is saturated with enormous responsibility. I don't think I have ever had anything like that in my life. Yes, with family, but outside of the family -- this was some challenge to me."

And yet, you see, you rose to the challenge, and you accepted it, and you fought it out.

I don't believe in being impatient with people who are foreign, in a sense, to the law. I am impatient with those who are in the law who do not carry forward in a fashion that one would expect. But for those who are not

MP 114

902

across the tracks. They want to stick in their nice little class. It's comfortable. And when they come to really meet an issue of life in their own families, they flop on their faces, not because they haven't got money, not because they haven't got learning, not because they haven't got a hell of a lot of books, but because they don't know the ABC's of human nature. They have never felt the thrill that comes of people who are desperate but who still have hope, of little people, who still fight all the way up, the cripples, the hunchbacks, those with legs off, who make a go of it.

Thank you.

JUROR NUMBER 4: Your Honor --

THE COURT: Now, sir, we will hear you.

JUROR NUMBER 4: One thing we are all agreed: we would like to recommend clemency. We are not lawyers --

THE COURT: Let me tell you something about that, because of your interest.

In the first place, across the country today, while you were deliberating, there were thousands of people, young, middle aged, old, who came before the various courts of the nation. Most of them had pled guilty, and the Court didn't have an inkling of who they were. All they knew is, they had pled guilty to a crime, and each one was sentenced according to the crime that was committed. The judge